

UNITED STATES DEPARTMENT OF THE INTERIOR

Fred A. Seaton, *Secretary*

Elmer F. Bennett, *Solicitor*

**DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR**

Edited by
MARIE J. TURINSKY



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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1957, to December 31, 1957. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Fred A. Seaton served as Secretary of the Interior during the period covered by this volume; Messrs. Clarence A. Davis and O. Hatfield Chilson served successively as Under Secretary; Messrs. Fred G. Aandahl, O. Hatfield Chilson, Roger C. Ernst, Royce A. Hardy, Ross L. Leffler, and Felix E. Wormser served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; and Messrs. J. Reuel Armstrong and Elmer F. Bennett* served successively as Solicitor of the Department of the Interior. Mr. Edmund T. Fritz served as Acting Solicitor from April 26, 1957, to May 21, 1957.

This volume will be cited within the Department of the Interior as "64 I. D."

Fred A. Seaton
Secretary of the Interior.

*Mr. Elmer F. Bennett was appointed Solicitor on May 21, 1957, and this volume is published under his direction.

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- Hull et al. v. Ingle* (24 L. D. 214); overruled, 30 L. D. 258.
- Huls, Clara* (9 L. D. 401); modified, 21 L. D. 377.
- Hunter, Charles H.* (60 I. D. 395); distinguished, 63 I. D. 65.
- Hurley, Bertha C.* (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 I. D. 12.
- Hyde, F. A.* (27 L. D. 472); vacated, 28 L. D. 284.
- Hyde, F. A., et al.* (40 L. D. 284); overruled, 43 L. D. 381.
- Hyde et al. v. Warren et al.* (14 L. D. 576; 15 L. D. 415). (See 19 L. D. 64.)
- Ingram, John D.* (37 L. D. 475). (See 43 L. D. 544.)
- Inman v. Northern Pacific R. R. Co.* (24 L. D. 318); overruled, 28 L. D. 95.
- Interstate Oil Corp. and Frank O. Chittenden* (50 L. D. 262); overruled so far as in conflict, 53 I. D. 228.
- Instructions* (32 L. D. 604); overruled so far as in conflict, 50 L. D. 628; 53 I. D. 365; *Lillian M. Peterson et al.* (A. 20411), August 5, 1937, unreported. (See 59 I. D. 282, 286.)
- Iowa Railroad Land Co.* (23 L. D. 79; 24 L. D. 125); vacated, 29 L. D. 79.
- Jacks v. Belard et al.* (29 L. D. 369); vacated, 30 L. D. 345.
- Jackson Oil Co. v. Southern Pacific Ry. Co.* (40 L. D. 528); overruled, 42 L. D. 317.
- Johnson v. South Dakota* (17 L. D. 411); overruled so far as in conflict, 41 L. D. 22.
- Jones, James A.* (3 L. D. 176); overruled, 8 L. D. 448.
- Jones v. Kennett* (6 L. D. 688); overruled, 14 L. D. 429.
- Kackmann, Peter* (1 L. D. 86); overruled, 16 L. D. 464.
- Kanawha Oil and Gas Co., Assignee* (50 L. D. 639); overruled so far as in conflict, 54 I. D. 371.
- Kemp, Frank A.* (47 L. D. 560); overruled so far as in conflict, 60 I. D. 417, 419.

- Kemper v. St. Paul and Pacific R. R. Co.* (2 C. L. L. 805); overruled, 18 L. D. 101.
- Kilner, Harold E., et al.* (A. 21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I. D. 258, 260.
- King v. Eastern Oregon Land Co.* (23 L. D. 579); modified, 30 L. D. 19.
- Kinney, E. C.* (44 L. D. 580); overruled so far as in conflict, 53 I. D. 228.
- Kinsinger v. Peck* (11 L. D. 202). (See 39 L. D. 162, 225.)
- Kiser v. Keech* (7 L. D. 25); overruled, 23 L. D. 119.
- Knight, Albert B., et al.* (30 L. D. 227); overruled, 31 L. D. 64.
- Knight v. Heirs of Knight* (39 L. D. 362, 491; 40 L. D. 461); overruled, 43 L. D. 242.
- Kniskern v. Hastings and Dakota R. R. Co.* (6 C. L. O. 50); overruled, 1 L. D. 362.
- Kolberg, Peter F.* (37 L. D. 453); overruled, 43 L. D. 181.
- Krigbaum, James T.* (12 L. D. 617); overruled, 26 L. D. 448.
- Krushnic, Emil L.* (52 L. D. 282, 295); vacated, 53 I. D. 42, 45. (See 280 U. S. 306.)
- Lackawanna Placer Claim* (36 L. D. 36); overruled, 37 L. D. 715.
- La Follette, Harvey M.* (26 L. D. 453); overruled so far as in conflict, 59 I. D. 416, 422.
- Lamb v. Ullery* (10 L. D. 528); overruled, 32 L. D. 331.
- Largent, Edward B., et al.* (13 L. D. 397); overruled so far as in conflict, 42 L. D. 321.
- Larson, Syvert* (40 L. D. 69); overruled, 43 L. D. 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co.* (3 C. L. O. 10); overruled, 14 L. D. 278.
- Las Vegas Grant* (13 L. D. 646; 15 L. D. 58); revoked, 27 L. D. 683.
- Laughlin, Allen* (31 L. D. 256); overruled, 41 L. D. 361.
- Laughlin v. Martin* (18 L. D. 112); modified, 21 L. D. 40.
- Law v. State of Utah* (29 L. D. 623); overruled, 47 L. D. 359.
- Lemmons, Lawson H.* (19 L. D. 37); overruled, 26 L. D. 389.
- Leonard, Sarah* (1 L. D. 41); overruled, 16 L. D. 464.
- Lindberg, Anna C.* (3 L. D. 95); modified, 4 L. D. 299.
- Linderman v. Wait* (6 L. D. 689); overruled, 13 L. D. 459.
- *Linhart v. Santa Fe Pacific R. R. Co.* (36 L. D. 41); overruled, 41 L. D. 284. (See 43 L. D. 536.)
- Little Pet Lode* (4 L. D. 17); overruled, 25 L. D. 550.
- Lock Lode* (6 L. D. 105); overruled so far as in conflict, 26 L. D. 123.
- Lockwood, Francis A.* (20 L. D. 361); modified, 21 L. D. 200.
- Loneragan v. Shockley* (33 L. D. 238); overruled so far as in conflict, 34 L. D. 314; 36 L. D. 199.
- Louisiana, State of* (8 L. D. 126); modified, 9 L. D. 157.
- Louisiana, State of* (24 L. D. 231); vacated, 26 L. D. 5.
- Louisiana, State of* (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
- Louisiana, State of* (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
- Lucy B. Hussey Lode* (5 L. D. 93); overruled, 25 L. D. 495.
- Luton, James W.* (34 L. D. 468); overruled so far as in conflict, 35 L. D. 102.
- Lyman, Mary O.* (24 L. D. 493); overruled so far as in conflict, 43 L. D. 221.
- Lynch, Patrick* (7 L. D. 33); overruled so far as in conflict, 13 L. D. 13.
- Madigan, Thomas* (8 L. D. 188); overruled, 27 L. D. 448.
- Maginnis, Charles P.* (31 L. D. 222); overruled, 35 L. D. 399.
- Maginnis, John S.* (32 L. D. 14); modified, 42 L. D. 472.
- Maher, John M.* (34 L. D. 342); modified, 42 L. D. 472.
- Mahoney, Timothy* (41 L. D. 129); overruled, 42 L. D. 313.

- Makela, Charles (46 L. D. 509); extended, 49 L. D. 244.
- Makemson v. Snider's Heirs (22 L. D. 511); overruled, 32 L. D. 650.
- Malone Land and Water Co. (41 L. D. 138); overruled in part, 43 L. D. 110.
- Maney, John J. (35 L. D. 250); modified, 48 L. D. 153.
- Maple, Frank (37 L. D. 107); overruled, 43 L. D. 181.
- Martin v. Patrick (41 L. D. 284); overruled, 43 L. D. 536.
- Mason v. Cromwell (24 L. D. 248); vacated, 26 L. D. 369.
- Masten, E. C. (22 L. D. 337); overruled, 25 L. D. 111.
- Mather et al. v. Hackley's Heirs (15 L. D. 487); vacated, 19 L. D. 48.
- Maughan, George W. (1 L. D. 25); overruled, 7 L. D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L. D. 301); modified, 48 L. D. 88.
- McBride v. Secretary of the Interior (8 C. L. O. 10); modified, 52 L. D. 33.
- McCalla v. Acker (29 L. D. 203); vacated, 30 L. D. 277.
- McCord, W. E. (23 L. D. 137); overruled to extent of any possible inconsistency, 56 I. D. 73.
- McCornick, William S. (41 L. D. 661, 666); vacated, 43 L. D. 429.
- *McCraney v. Heirs of Hayes (33 L. D. 21); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- McDonald, Roy (34 L. D. 21); overruled, 37 L. D. 285.
- *McDonogh School Fund (11 L. D. 378); overruled, 30 L. D. 616. (See 35 L. D. 399.)
- McFadden et al. v. Mountain View Mining and Milling Co. (26 L. D. 530); vacated, 27 L. D. 358.
- McGee, Edward D. (17 L. D. 285); overruled, 29 L. D. 166.
- McGrann, Owen (5 L. D. 10); overruled, 24 L. D. 502.
- McGregor, Carl (37 L. D. 693); overruled, 38 L. D. 148.
- McHarry v. Stewart (9 L. D. 344); criticized and distinguished, 56 I. D. 340.
- McKernan v. Bailey (16 L. D. 368); overruled, 17 L. D. 494.
- *McKittrick Oil Co. v. Southern Pacific R. R. Co. (37 L. D. 243); overruled so far as in conflict, 40 L. D. 528. (See 42 L. D. 317.)
- McMicken, Herbert et al. (10 L. D. 97; 11 L. D. 96); distinguished, 58 I. D. 257, 260.
- McNamara et al. v. State of California (17 L. D. 296); overruled, 22 L. D. 666.
- McPeck v. Sullivan et al. (25 L. D. 281); overruled, 36 L. D. 26.
- *Mee v. Hughart et al. (23 L. D. 455); vacated, 28 L. D. 209. In effect reinstated, 44 L. D. 414, 487; 46 L. D. 434; 48 L. D. 195, 346, 348; 49 L. D. 660.
- *Meeboer v. Heirs of Schut (35 L. D. 335); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- Mercer v. Buford Townsite (35 L. D. 119); overruled, 35 L. D. 649.
- Meyer, Peter (6 L. D. 639); modified, 12 L. D. 436.
- Meyer v. Brown (15 L. D. 307). (See 39 L. D. 162, 225.)
- Midland Oilfields Co. (50 L. D. 620); overruled so far in conflict, 54 I. D. 371.
- Miller, D. (60 I. D. 161); overruled in part, 62 I. D. 210.
- Miller, Edwin J. (35 L. D. 411); overruled, 43 L. D. 181.
- Miller v. Sebastian (19 L. D. 288); overruled, 26 L. D. 448.
- Milner and North Side R. R. Co. (36 L. D. 488); overruled, 40 L. D. 187.
- Milton et al. v. Lamb (22 L. D. 339); overruled, 25 L. D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D. 79); overruled, 29 L. D. 112.
- Miner v. Marriott et al. (2 L. D. 709); modified, 28 L. D. 224.
- Minnesota and Ontario Bridge Company (30 L. D. 77); no longer followed, 50 L. D. 359.
- *Mitchell v. Brown (3 L. D. 65); overruled, 41 L. D. 396. (See 43 L. D. 520.)

- Monitor Lode (18 L. D. 358); overruled, 25 L. D. 495.
- Monster Lode (35 L. D. 493); overruled so far as in conflict, 55 L. D. 348.
- Moore, Charles H. (16 L. D. 204); overruled, 27 L. D. 482.
- Morgan v. Craig (10 C. L. O. 234); overruled, 5 L. D. 303.
- Morgan v. Rowland (37 L. D. 90); overruled, 37 L. D. 618.
- Moritz v. Hinz (36 L. D. 450); vacated, 37 L. D. 382.
- Morrison, Charles S. (36 L. D. 126); modified, 36 L. D. 319.
- Morrow et al. v. State of Oregon et al. (32 L. D. 54); modified, 33 L. D. 101.
- Moses, Zelter R. (36 L. D. 473); overruled, 44 L. D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D. 100); overruled in part, 36 L. D. 551.
- Mt. Whitney Military Reservation (40 L. D. 315). (See 43 L. D. 33.)
- Muller, Ernest (46 L. D. 243); overruled, 48 L. D. 163.
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- Mulnix, Philip, Heirs of (33 L. D. 331); overruled, 43 L. D. 532.
- Nebraska, State of (18 L. D. 124); overruled, 28 L. D. 358.
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- Neilsen v. Central Pacific R. R. Co. et al. (26 L. D. 252); modified, 30 L. D. 216.
- Newbanks v. Thompson (22 L. D. 490); overruled, 29 L. D. 108.
- Newlon, Robert C. (41 L. D. 421); overruled so far as in conflict, 43 L. D. 364.
- New Mexico, State of (46 L. D. 217); overruled, 48 L. D. 98.
- New Mexico, State of (49 L. D. 314); overruled, 54 L. D. 159.
- Newton, Walter (22 L. D. 322); modified, 25 L. D. 188.
- New York Lode and Mill Site (5 L. D. 513); overruled, 27 L. D. 373.
- *Nickel, John R. (9 L. D. 388); overruled, 41 L. D. 129. (See 42 L. D. 313.)
- Northern Pacific R. R. Co. (20 L. D. 191); modified, 22 L. D. 224; overruled so far as in conflict, 29 L. D. 550.
- Northern Pacific R. R. Co. (21 L. D. 412; 23 L. D. 204; 25 L. D. 501); overruled, 53 L. D. 242. (See 26 L. D. 265; 33 L. D. 426; 44 L. D. 218; 177 U. S. 435.)
- Northern Pacific Ry. Co. (48 L. D. 573); overruled so far as in conflict, 51 L. D. 196. (See 52 L. D. 58.)
- Northern Pacific R. R. Co. v. Bowman (7 L. D. 238); modified, 18 L. D. 224.
- Northern Pacific R. R. Co. v. Burns (6 L. D. 21); overruled, 20 L. D. 191.
- Northern Pacific R. R. Co. v. Loomis (21 L. D. 395); overruled, 27 L. D. 464.
- Northern Pacific R. R. Co. v. Marshall et al. (17 L. D. 545); overruled, 28 L. D. 174.
- Northern Pacific R. R. Co. v. Miller (7 L. D. 100); overruled so far as in conflict, 16 L. D. 229.
- Northern Pacific R. R. Co. v. Sherwood (28 L. D. 126); overruled so far as in conflict, 29 L. D. 550.
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- Nunez, Roman C. and Serapio (56 I. D. 363); overruled so far as in conflict, 57 I. D. 213.
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- Olson v. Traver et al. (26 L. D. 350, 628); overruled so far as in conflict, 29 L. D. 480; 30 L. D. 382.
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- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D. 43035, May Caramony). (See 58 I. D. 149, 154-156.)
- Opinion of Solicitor, October 31, 1917 (D. 40462); overruled so far as inconsistent, 58 I. D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D. 44083); overruled, November 4, 1921 (M. 6397). (See 58 I. D. 158, 160.)
- Opinion of Solicitor, August 8, 1933 (M. 27499); overruled so far as in conflict, 54 I. D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I. D. 517); overruled in part, Feb. 11, 1957 (M. 36410).
- Opinion of Solicitor, May 8, 1940 (57 I. D. 124); overruled in part, 58 I. D. 562, 567.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I. D. 333.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I. D. 331. (See 59 I. D. 346, 350.)
- Opinion of Solicitor, August 31, 1943 (M. 33183); distinguished, 58 I. D. 726, 729.
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- Opinion of Solicitor, March 28, 1949 (M. 35093); overruled in part, 64 I. D. 70.
- Opinion of Solicitor, Jan. 19, 1956, (M. 36378); overruled to extent inconsistent, 64 I. D. 58.
- Oregon and California R. R. Co. v. Puckett (39 L. D. 169); modified, 53 I. D. 264.
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- Phebus, Clayton (48 L. D. 128); overruled so far as in conflict, 50 L. D. 281.
- Phelps, W. L. (8 C. L. O. 139); overruled, 2 L. D. 854.
- Phillips, Alonzo (2 L. D. 321); overruled, 15 L. D. 424.
- Phillips v. Breazeale's Heirs (19 L. D. 573); overruled, 39 L. D. 93.
- Pieper, Agnes C. (35 L. D. 459); overruled, 43 L. D. 374.
- Pierce, Lewis W. (18 L. D. 328); vacated, 53 I. D. 447; overruled so far as in conflict, 59 I. D. 416, 422.
- Pietkiewicz et al. v. Richmond (29 L. D. 195); overruled, 37 L. D. 145.
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- Pike's Peak Lode (14 L. D. 47); overruled, 20 L. D. 204.
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- Prescott, Henrietta P. (46 L. D. 486); overruled, 51 L. D. 287.
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- Rankin, John M. (20 L. D. 272); reversed, 21 L. D. 404.
- Rebel Lode (12 L. D. 683); overruled, 20 L. D. 204; 48 L. D. 523.
- *Reed v. Buffington (7 L. D. 154); overruled, 8 L. D. 110. (See 9 L. D. 360.)
- Regione v. Rosseler (40 L. D. 93); vacated, 40 L. D. 420.
- Reid, Bettie H., Lucille H. Pipkin (61 I. D. 1); overruled, 61 I. D. 355.
- Rialto No. 2 Placer Mining Claim (34 L. D. 44); overruled, 37 L. D. 250.
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- Roberts v. Oregon Central Military Road Co. (19 L. D. 591); overruled, 31 L. D. 174.
- Robinson, Stella G. (12 L. D. 443); overruled, 13 L. D. 1.
- Rogers, Fred B. (47 L. D. 325); vacated, 53 I. D. 649.
- Rogers, Horace B. (10 L. D. 29); overruled, 14 L. D. 321.
- Rogers v. Atlantic & Pacific R. R. Co. (6 L. D. 565); overruled so far as in conflict, 8 L. D. 165.
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- *St. Paul, Minneapolis and Manitoba Ry. Co. (8 L. D. 255); modified, 13 L. D. 354. (See 32 L. D. 21.)
- St. Paul, Minneapolis and Manitoba Ry. Co. v. Hagen (20 L. D. 249); overruled, 25 L. D. 86.
- St. Paul, Minneapolis and Manitoba Ry. Co. v. Fogelberg (29 L. D. 291); vacated, 30 L. D. 191.
- Salsberry, Carroll (17 L. D. 170); overruled, 39 L. D. 93.
- Sangre de Cristo and Maxwell Land Grants (46 L. D. 301); modified, 48 L. D. 88.
- Santa Fe Pacific R. R. Co. v. Peterson (39 L. D. 442); overruled, 41 L. D. 383.
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- *Sayles, Henry P. (2 L. D. 88); modified, 6 L. D. 797. (See 37 L. D. 330.)
- Schweitzer v. Hilliard et al. (19 L. D. 294); overruled so far as in conflict, 26 L. D. 639.
- Serrano v. Southern Pacific R. R. Co. (6 C. L. O. 93); overruled, 1 L. D. 380.
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- Smead v. Southern Pacific R. R. Co. (21 L. D. 432); vacated, 29 L. D. 135.
- Snook, Noah A., et al. (41 L. D. 428); overruled so far as in conflict, 43 L. D. 364.
- Sorli v. Berg (40 L. D. 259); overruled, 42 L. D. 557.
- Southern Pacific R. R. Co. (15 L. D. 460); reversed, 18 L. D. 275.

- Southern Pacific R. R. Co. (28 L. D. 281); recalled, 32 L. D. 51.
- Southern Pacific R. R. Co. (33 L. D. 89); recalled, 33 L. D. 528.
- Southern Pacific R. R. Co. *v.* Bruns (31 L. D. 272); vacated, 37 L. D. 243.
- South Star Lode (17 L. D. 280); overruled, 20 L. D. 204; 48 L. D. 523.
- Spaulding *v.* Northern Pacific R. R. Co. (21 L. D. 57); overruled, 31 L. D. 151.
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- Standard Shales Products Co. (52 L. D. 522); overruled so far as in conflict, 53 L. D. 42.
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- State of California (19 L. D. 585); vacated, 28 L. D. 57.
- State of California (22 L. D. 428); overruled, 32 L. D. 34.
- State of California (32 L. D. 346); vacated, 50 L. D. 628. (See 37 L. D. 499 and 46 L. D. 396.)
- State of California (44 L. D. 118); overruled, 48 L. D. 98.
- State of California (44 L. D. 468); overruled, 48 L. D. 98.
- State of California *v.* Moccettini (19 L. D. 359); overruled, 31 L. D. 335.
- State of California *v.* Pierce (3 C. L. O. 118); modified, 2 L. D. 854.
- State of California *v.* Smith (5 L. D. 543); overruled so far as in conflict, 18 L. D. 343.
- State of Colorado (7 L. D. 490); overruled, 9 L. D. 408.
- State of Florida (17 L. D. 355); reversed, 19 L. D. 76.
- State of Florida (47 L. D. 92, 93); overruled so far as in conflict, 51 L. D. 291.
- State of Louisiana (8 L. D. 126); modified, 9 L. D. 157.
- State of Louisiana (24 L. D. 231); vacated, 26 L. D. 5.
- State of Louisiana (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
- State of Louisiana (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
- State of Nebraska (18 L. D. 124); overruled, 28 L. D. 358.
- State of Nebraska *v.* Dorrington (2 C. L. L. 467); overruled so far as in conflict, 26 L. D. 123.
- State of New Mexico (46 L. D. 217); overruled, 48 L. D. 98.
- State of New Mexico (49 L. D. 314); overruled, 54 L. D. 159.
- State of Utah (45 L. D. 551); overruled, 48 L. D. 98.
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NOTE.—The abbreviations used in this title refer to the following publications: "B. L. P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C. L. L." to Copp's Public Land Laws, edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C. L. O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L. D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I. D." to Decisions of the Department of the Interior, beginning with vol. 53.—
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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

GILBERT V. LEVIN

A-27393

Decided January 30, 1957

Small Tract Act: Renewal of Lease

Where under the Department's regulations in effect at the time a small tract lease is issued, the lessee is given a preferential right to renewal of his lease upon timely application therefor, if it is determined that a new lease should be issued, the preferential right must be recognized even though the Department's regulations are later amended prior to the expiration of the lease to impose additional conditions for renewal and to eliminate the preferential right to renewal.

Small Tract Act: Renewal of Lease

A preferential right to renewal of a small tract lease if any new lease is issued granted under the terms of the lease is a contractual preference right which must be recognized if any new lease is issued after the expiration of the term of the existing lease.

Regulations: Applicability

Where a lease provides that it is issued subject to regulations issued pursuant to a statute, in the absence of any other provision or indication to the contrary, the lease will be construed to incorporate only the regulations existing at the time when the lease was issued and not any future amendment of the regulations.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On April 18, 1950, a small tract lease was issued to Gilbert V. Levin for a period of 5 years under the terms of the act of June 1, 1938, as amended (43 U. S. C., 1952 ed., sec. 682a). Section 3 of the lease provided that the lessee could purchase the land leased on or after 1 year from the date of the lease, provided he had made the improvements required by the terms of the lease. By section 4 of the lease the lessee agreed to construct improvements appropriate for the use for which the lease was issued, which was as a cabin site.

On November 12, 1954, the manager of the Los Angeles land office received a letter dated November 6, 1954, from the lessee explaining that approximately a year after obtaining his lease he had changed

his employment and had moved to the District of Columbia; that he had not surrendered his lease when he moved from California as he intended to return to that State; and that due to lack of funds and time for travel he had not been able to make the necessary improvements to the land in order to claim it, and would not be able to do so before the lease expired on April 17, 1955. The lessee therefore requested a renewal of his lease under section 2 of the lease.

Section 2 of the lease provided:

The Lessee may apply for renewal of the lease, not more than 6 months nor less than 60 days prior to the expiration thereof, and, if it is determined that a new lease should be granted, will be accorded a preference right to a new lease, for such term and upon such conditions as may be fixed.

By a decision dated January 13, 1955, the manager rejected the application to renew the lease.¹ The lessee appealed from this decision to the Director of the Bureau of Land Management.

In a decision dated June 14, 1956, the Director affirmed the manager's decision. From this decision Mr. Levin has filed a timely appeal to the Secretary of the Interior.

The Small Tract Act makes no specific provision for the renewal of leases issued under the act. Provision for the granting of renewals is contained in the regulations issued by the Secretary pursuant to the authority granted to him under the act. In his decision the Director, Bureau of Land Management, stated that the pertinent regulation relating to the renewal of the appellant's lease was 43 CFR, 1955 Supp., 257.15, which was in effect at the time the appellant's lease expired. Paragraph (c) of this regulation provides in pertinent part as follows:

(c) Where the land has been classified for lease and sale, renewals will be approved only upon a satisfactory showing that the lessee's failure to meet the requirements for sale of the tract is justified under the circumstances and that nonrenewal of the lease would work an extreme hardship on the lessee.

It is very doubtful whether any of the statements made by the appellant in his appeals to the Director and the Secretary justify his failure to apply for the sale of the tract. Certainly, the fact that the appellant voluntarily chose to move from California to the District of Columbia does not justify granting a renewal of the lease.

However, the regulation cited by the Director is not the regulation in effect at the time the appellant's lease was issued to him. The regulation in effect at that time (April 18, 1950) provided:

Renewal of lease; preference rights. (a) The manager may act upon all applications to renew leases. He may issue such renewal leases for periods not

¹ There is no copy of the decision in the case file.

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exceeding five years, provided the land then is classified for the purpose specified in the original lease.

(b) Upon the filing of an application for the renewal of a lease, not more than 6 months or less than 60 days prior to its expiration, the lessee or his duly approved successor in interest will be awarded a preference right to a new lease, upon such terms and for such duration as may be fixed, if it is determined that a new lease should be granted. * * * (43 CFR, 1949 ed., 257.11.)

Section 2 of appellant's lease, quoted earlier, was based upon this regulation.

It will be observed that this regulation is considerably different from the regulation relied upon by the Director. Under the new regulation (sec. 257.15 (c)), a lessee, in order to secure a renewal, must justify his failure to apply for the sale of the tract and must show that non-renewal would work an extreme hardship on him. The earlier regulation (sec. 257.11) required no such showing. It simply provided that if a lessee filed in time, he would be awarded a preference right to a new lease if it was determined that a new lease should be granted.

Section 1 of the appellant's lease read as follows:

Pursuant to the Act of June 1, 1938 * * * and subject to valid existing rights, *the regulations issued under said Act*, and the terms and conditions herein set forth, the United States of America, the Lessor, * * * hereby leases to Gilbert V. Levin * * *. [Italics added.]

This provision of the lease clearly incorporated the regulations in effect at the time when the lease was issued, specifically, sec. 257.11. The question then is whether it incorporated any future amendment of the regulations. Only if it did can the Director's decision be justified.

The only other provision in the appellant's lease relating to regulations is section 8, which provided for cancellation of the lease in the event of a failure by the lessee to observe "any of the terms and conditions hereof, or of the regulations issued under the Act of June 1, 1938 * * *." This throws no light on the question.

The Department has long been aware of the problem of incorporating future regulations in leases or other agreements. Thus, in form Nos. 4-1158 and 4-1196, currently used for noncompetitive oil and gas leases on public lands and acquired lands, respectively, it is provided in the opening paragraph that the lessee offers to lease "pursuant and subject * * * to all reasonable regulations of the Secretary of the Interior now or hereafter in force * * *." Similar language was included in the noncompetitive oil and gas lease form prescribed over 20 years ago (sec. 2 (m) of lease form, Circ. 1386, 55 I. D. 513). Also, in the form prescribed by the Department for unit agreements for unproven areas, section 1 provides that "all valid pertinent regula-

tions * * * heretofore issued thereunder [the Mineral Leasing Act] or valid pertinent and reasonable regulations hereafter issued thereunder are accepted and made a part of this agreement * * *” (30 CFR, 1955 Supp., 226.12).

In the nonmineral field, form 4-721 currently used for grazing leases provides in section 2 that the lessee applies to lease pursuant and subject “to all regulations of the Secretary of the Interior now or hereafter in force when not inconsistent with any express and specific provisions herein * * *.”

More pertinent is the fact that in 1950, when the appellant’s lease was issued, the Department was using a form for the renewal of small tract leases in which the lessee agreed “1. To comply with all existing and future regulations issued under the act of June 1, 1938 * * *.” See *Joseph L. Kirg*, A-26843 (December 18, 1953).

In the face of the clear practice of the Department to provide specifically in leases and agreements for the incorporation of future regulations where such is the intent, I am unable to read in the language of the appellant’s lease any such purpose. Consequently, I conclude that the appellant’s lease did not incorporate amendments to the small tract regulations made after the issuance of the lease.

At this point it should be observed that this discussion relates to the incorporation of changes in regulations which impose an additional obligation or burden upon a lessee. Where changes in regulations relieve a lessee of obligations or extend him a benefit and are not detrimental to the interests of the United States, such a benefit might well be extended to a lessee even though his lease did not incorporate future regulations. However, this is not the question presented here and need not be considered further.

The final question here is whether the appellant is entitled to a renewal of his lease under section 2 of his lease and sec. 257.11 of the regulations in effect when his lease was issued. As to that, it seems clear that the appellant had a contractual right to the renewal of his lease provided two conditions were met: (1) that he apply for a renewal within the time limits specified, and (2) that it is determined that a new lease should be issued. The appellant met the first requirement. The second requirement involves a determination to be made by the Department. So far as the record discloses, it has not yet been determined whether the land involved should be leased again under the Small Tract Act. If it is to be leased, the appellant has a contractual preference right to a new lease.

This conclusion is inescapable in view of the rulings of the Department on a similar renewal provision formerly included in grazing leases issued under section 15 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315m). The grazing leases provided that—

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* * * if at the end of said period it shall be determined that a new lease should be granted, the lessee herein will be accorded a preference right thereto upon such terms and for such duration as may be fixed by the lessor.

The Department has held in numerous cases that this provision constituted a contractual preference right whereby the Department contracted to give the lessee a preference right over all others to any new lease which might be given on the land. *Elmer R. Chandler, Dan O'Keeffe*, 59 I. D. 244 (1946); *John A. Martin and Grover C. Lessard*, 59 I. D. 258 (1946); *The Swan Co. v. Banzhaf*, 59 I. D. 262 (1946); *J. D. Kouba*, 60 I. D. 205 (1948). Although a grazing lease and a small tract lease are not the same thing, nevertheless, the renewal clauses in both leases are legally indistinguishable: in both cases a preference right to renewal of an existing lease is granted by the terms of the lease, and the right is conditioned only by a determination that a new lease is to be issued. I see no basis for distinguishing the two situations, or holding that the contractual preference right granted to the appellant is any less binding upon the Department than the contractual right in the grazing cases cited *supra*.

As stated earlier, however, the record does not show whether or not any determination has been made that a new lease should be issued for the land formerly embraced in the appellant's lease. If such a determination is made, the appellant should be allowed a renewal of his lease since his application for renewal was timely filed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is reversed and the case is remanded for further action in accordance with this decision.

EDMUND T. FRITZ,
Acting Solicitor.

HUMBLE OIL & REFINING COMPANY

A-27363

Decided January 30, 1957

Words and Phrases—Oil and Gas Leases: Relinquishments

Effective as of the date of its filing. The phrase "effective as of the date of its filing" in section 30 (b) of the Mineral Leasing Act, providing that a relinquishment of an oil and gas lease "shall be effective as of the date of its filing," means that a relinquishment is effective to terminate the lease from the first instant of the day upon which it is filed, and is not effective merely from the time it is filed on that day.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Relinquishments

Where relinquishments of acquired lands oil and gas leases are filed on the first day of the fourth year of the lease, the relinquishments are effective

to terminate the leases as of the first instant of the day upon which they are filed, although the time of filing was later in the day, and, therefore, rentals for the fourth lease year do not accrue.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Humble Oil & Refining Company has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated April 2, 1956, which affirmed the decisions of the Eastern States Office of the Bureau, dated March 14, 1955, holding that the fourth year's rentals on some five oil and gas leases held by the company under the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 351 *et seq.*) had accrued on July 1, 1954, and demanding payment of the rentals.

The record shows the leases were all issued effective as of July 1, 1951, and, therefore, that the fourth year of the leases commenced on July 1, 1954; that on July 1, 1954, at 9:30 a. m., relinquishments of each of the leases were received in the mail center of the Office of the Secretary, and in the Bureau of Land Management at 1:50 p. m., on the same day.

The decisions of the Director and the Eastern States Office held that by section 2 (d) of the leases, and in accordance with the statutory and regulatory provisions governing rental under the leases (30 U. S. C., 1952 ed., sec. 226; 43 CFR 192.80), the lessee agreed to pay the annual rental specified in the lease in advance on the first day of the month in which each lease was issued; that the annual rentals for the fourth lease year became payable on July 1, 1954; that since the relinquishments of the leases were not received before the accrual of the fourth year's rentals, the rentals were due the United States when the leases were canceled; and that there is no authority whereby such accrued rentals may be waived.

In its appeal to the Secretary the appellant argues that the relinquishments were received simultaneously with the accrual of the advance rentals and not *after* the rentals accrued; that under the provisions of the pertinent departmental regulation, 43 CFR 192.160,¹ a relinquishment takes effect on the date it is filed; that the relinquishments operated to terminate the leases on July 1, 1954; and that, therefore, as the leases terminated on July 1, 1954, no rentals accrued there-

¹ The pertinent provision of this regulation is as follows:

"A lease or any legal subdivision thereof may be surrendered by the record title holder by filing a written relinquishment, in triplicate, in the proper land office. A relinquishment shall take effect on the date it is filed subject to the continued obligation of the lessee and his surety to make payment of all accrued rentals and royalties and to place all wells on the land to be relinquished in condition for suspension or abandonment in accordance with the regulations and the terms of the lease. * * *

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under on July 1, 1954, for the ensuing year. The appellant agreed that had the leases been in effect on July 1, 1954, the fourth year's rentals thereunder would have accrued and the lessee would have been obligated to pay them.

Section 30 (b) of the Mineral Leasing Act of February 25, 1920, as added by the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 187b), which is incorporated by reference in section 3 of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1952 ed., sec. 352), provides that a lessee may at any time file in an appropriate land office a written relinquishment of all his rights, and that such relinquishment "shall be effective as of the date of its filing." The question of the effect of the filing of the appellant's relinquishments then must turn upon what interpretation is given section 30 (b) of the Mineral Leasing Act of 1920. If the words quoted mean that a relinquishment is effective only from the *time* of the day of its filing and thereafter, it must be held that the rentals had already accrued prior to the time the appellant's relinquishments were filed and that, although the relinquishments served to terminate the leases, they did not operate to cut off the accrual of the rentals. Under such an interpretation the filing of a relinquishment would have no retroactive effect whatsoever. On the other hand, if section 30 (b) is interpreted to mean that the filing of a relinquishment is effective retroactively for all of the day of its filing, then the advance rentals could not be said to have accrued on July 1, 1954, as the leases ceased to exist as of the first moment of that date.

Inasmuch as the Department has never made a ruling on the same or a similar question, the Comptroller General of the United States was requested on September 24, 1956, by the Administrative Assistant Secretary to give his opinion on the question—

Should the words "shall be effective as of the date of its filing" be construed to mean that a relinquishment is effective retroactively for the entire period of the date upon which it is filed so as to prevent the accrual of rentals which would otherwise become due and payable on that date?

In the letter to the Comptroller General, the view was expressed that the broader rather than the narrower interpretation should be given the words "shall be effective as of the date of filing." In view of the familiar principle that the law does not consider parts of a day, except in certain special circumstances, the opinion was expressed that the rentals did not accrue, and that had Congress intended that a relinquishment should take effect only from the *time* it is filed the probable wording of the statute would have been "shall be effective as of the *time* of its filing." The absence of such wording raises the assumption that the Congress did not intend to place a restrictive

effect on the filing of relinquishments. By using the word "date" instead of "time" Congress seems to have intended a larger period of time as of which the relinquishment would be effective, that is, the whole of the 24-hour period during which the relinquishment is filed.

On January 9, 1957, a letter dated January 2, 1957 (B-129315), was received from the Acting Comptroller General in which he stated:

The sole problem presented concerns the effect of a relinquishment filed on rent day, the day rent is due and payable in advance. As noted above, under the terms of the applicable statute [reference to 30 U. S. C., sec 187 (b)] a relinquishment becomes effective as of the date of its filing. The word "date" in its ordinary meaning imports the day, month, and year, and this is also the legal significance of the word. 25 C. J. S. Date. The word "date" generally will be construed as including the entire day or date except where acts are required to be done in a certain order. 11 W. & P. Perm. 93. For the purposes of this case then, it would not be legally objectionable to construe the word "date" as being equivalent to a particular day. Ordinarily, when computing time a day is not fractionized. As stated in 86 C. J. S. Time, § 16:

"As a general rule, in the computation of time, a day is to be considered as an indivisible unit or period of time, which has its beginning coincident with the first moment of the day * * *."

Hence, the relinquishments filed on July 1, 1954, may be considered as having taken effect "coincident with the first moment of the day."

By application of this same concept to the rental, it is obvious that the fourth year's rental became due and payable at the first moment of the day but since the relinquishments became effective at that same moment it cannot be said that the fourth year's rental had already accrued. To so hold would render inoperative the statutory command that a relinquishment becomes effective "as of the date" of filing and, of course, such a conclusion would be inequitable since the Government would obtain the rent and the use of the property, too.

Thereupon, the Acting Comptroller General concluded that it is not necessary to demand payment of rent from the appellant for the period beginning July 1, 1954.

On the basis of the conclusion reached by the Acting Comptroller General, which is in full agreement with the opinion expressed by the Administrative Assistant Secretary, it is concluded that the relinquishments filed by the appellant on July 1, 1954, had the effect of terminating the leases, *eo instanti*, as of the first moment of that day; that, therefore, no advance rentals accrued on July 1, 1954, and the appellant is not obligated to pay the advanced rentals demanded.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director, Bureau of Land Management, is reversed and the case is remanded to the Bureau for proper action in accordance with this decision.

EDMUND T. FRITZ,
Acting Solicitor.

*February 4, 1957***MARGARET A. ANDREWS
CHARLES B. GONSALES****A-27328***Decided February 4, 1957***Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to**

It is error to hold that land in an oil and gas lease became available for filing at the expiration of the primary term of the lease when in fact the lease was extended for another 5 years.

Oil and Gas Leases: Applications—Oil and Gas Leases: Relinquishments

An application for an oil and gas lease filed after a relinquishment of an existing lease has been filed but before notation of the relinquishment is made in the tract book is prematurely filed and is properly rejected.

Oil and Gas Leases: Extensions

A 5-year extension of a noncompetitive oil and gas lease is not invalid where it was based upon an application for extension filed prior to 90 days before the expiration of the primary term of the lease.

Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Applications

Where an oil and gas lease is in its extended term, no application can be filed for the leased land regardless of whether the extension of the lease was valid or invalid.

Oil and Gas Leases: Applications

Where an oil and gas application was stamped as filed 2 minutes prior to the notation of cancellation of a prior lease covering the land and it is contended that the application was not prematurely filed because the stamping device was more than 2 minutes slower than the clock used in noting the cancellation, the official times noted on the application and in the tract book must be accepted as conclusive in the absence of positive evidence showing the times to be wrong.

Rules of Practice: Hearings

Where the time stamp on an application shows that it was prematurely filed and the applicant contends that the stamp is erroneous and that the application was timely filed, a hearing will not be held on the issue where there is no reasonable likelihood that a hearing would develop facts decisive of the issue and no showing is made by the applicant that he will be able to present evidence controverting the facts of record.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On May 1, 1947, a 5-year oil and gas lease, Las Cruces 060712, was issued to Ed Shockley, which covered approximately 960 acres in T. 14 S., R. 31 E., N. M. P. M. At a later date some 640 acres of the land in the original lease were assigned by Shockley and a new lease, Las Cruces 070336, was created of the assigned land. On January 28, 1952, Shockley filed an application for a 5-year extension of Las

Cruces 060712, and by decision dated May 12, 1952, the lease was extended for 5 years. On May 10, 1954, Shockley filed a relinquishment covering all of the lands embraced in his lease. The record shows that an entry was made in the tract book of the Santa Fe land office that the lease was "canceled by relinquishment 6-22-54 at 2:30 p. m."

By a decision dated October 25, 1954, the acting manager of the Santa Fe land office rejected an oil and gas lease offer, New Mexico 015205, filed by Charles B. Gonsales for the reason that the land applied for was included in the Shockley lease at the time the offer was filed. The record shows that the Gonsales offer was stamped as received at 2:28 p. m. on June 22, 1954, two minutes prior to the notation of cancellation of the Shockley lease.

The record also shows that an oil and gas lease offer for the lands embraced in the Shockley lease was filed by Margaret A. Andrews at 2:34 p. m. on June 22, 1954, four minutes after the notation respecting the Shockley lease was made.¹

Gonsales appealed to the Director of the Bureau of Land Management from the acting manager's decision rejecting his application.

In his appeal to the Director, Gonsales contended that the clock used in noting the time of the notation of the relinquishment of the Shockley lease in the tract book was not synchronized with the electric stamping device used to indicate the filing of his application, and that as a result of this disparity of time his application was erroneously shown to have been filed at 2:28 p. m., although his offer to lease was filed subsequent to the notation on the tract book.

In his decision dated January 10, 1956, the Director, Bureau of Land Management, held that the record showed that the rejected Gonsales oil and gas lease offer was filed subsequent to the date on which the primary term of the Shockley lease would have expired, if the lease had not been canceled upon relinquishment, but before the cancellation had been noted on the tract book; that the Department's regulation, 43 CFR 192.43, which provides that where a noncompetitive oil and gas lease is canceled or relinquished the lands will immediately be open to further oil and gas leasing upon notation in the tract books of the relinquishment or cancellation, merely establishes the administrative procedure to be followed in the event of the cancellation

¹ At the same time that the Gonsales application was filed, an oil and gas lease application, New Mexico 015206, was filed by Charles C. Loveless, Jr., for the same lands. As the two applications were stamped as filed simultaneously at 2:28 p. m., a drawing was held to determine the priority between the two applications. By a decision dated July 27, 1954, the manager announced that the Gonsales application had been given priority number one as a result of the drawing.

Similarly, an oil and gas application, New Mexico 015207, was filed by Rubie Crosby Bell at the same time as the Andrews application, and as a result of a public drawing Margaret A. Andrews' application was deemed to have priority.

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or relinquishment of a lease; and that this administrative regulation regarding the posting of cancellations and relinquishments on the tract books cannot be held to extend the segregative effect of an oil and gas lease where the lease expires at the end of its primary term. Thereupon, the Director reversed the manager's decision and held the Andrews lease offer for rejection.²

From this decision Mrs. Andrews has appealed to the Secretary of the Interior.

The Director's decision overlooked the fact that oil and gas lease Las Cruces 060712 was extended for a period of 5 years, or until May 1, 1957, and therefore did not expire and could not have expired on April 30, 1952, the end of the primary term of the lease. Under these circumstances, the Department's regulation, 43 CFR 192.43, was pertinent and, therefore, if the Gonsales application was filed prior to the noting of the relinquishment in the tract book, it was premature because the lands were not open to further filing and the application was properly rejected. *Ralph J. Fuchs*, A-27295 (March 27, 1956).

Gonsales attempts to defend the Director's ruling by contending that the extension of the Shockley lease was invalid since Shockley filed his application for extension on January 28, 1952, prior to 90 days before the end of the lease term. He asserts that section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), makes it mandatory that an application for a 5-year extension be filed only within the period of 90 days before the expiration of the primary term of the lease. Several years ago the Department construed the identical provision in the act of July 29, 1942 (56 Stat. 726), which gave holders of noncompetitive leases a preference right to a new lease, not to bar the issuance of a lease upon the basis of an application which was filed prematurely but which was not rejected and remained on file during the 90-day period. Solicitor's opinion M-36045 (July 26, 1950). Gonsales contends that that ruling is inapplicable to the Shockley lease because it dealt with a different statute. However, in principle the situation appears indistinguishable.

It is unnecessary to labor this point since another established principle is applicable. This principle is that whether an outstanding lease is void or voidable, it bars any filing for the leased land until the cancellation of the lease is noted on the tract book. *Joyce A. Cabot et al.*, 63 I. D. 122 (1956); *R. B. Whitaker et al.*, 63 I. D. 124 (1956). The rule has been applied to the erroneous extension of an oil and gas lease. *Hjalmer A. Jacobson et al.*, 61 I. D. 116 (1953). Consequently

² Although the Director's decision did not specifically state that an oil and gas lease should be issued to Gonsales, the rejection of the Andrews application was impliedly a finding that such action would be taken absent an appeal by Mrs. Andrews.

the extension of the Shockley lease barred any filing for the leased land until notation of the cancellation or termination of the lease.

It therefore becomes necessary to determine whether or not the Gonsales application was in fact the first qualified application filed for the land involved. Gonsales contends that because the clock in the record room and the time stamping device in the file room were not synchronized, his application was really filed after the relinquishment of the Shockley lease had been noted. To support his contention Gonsales has submitted evidence in the form of affidavits of persons who were present in the land office on June 22, 1954, the date the relinquishment of the Shockley lease was noted on the tract books. The affidavit of Hoover Wright, who filed the application in behalf of Charles C. Loveless, Jr., states in part that he was in the room where the tract books are kept and that—

* * * Sometime between 2:25 p. m. o'clock and 2:28 p. m. o'clock, approximate time, I observed Della Lujan, an employee in the record room remove the tract book which contained the land description embraced in non-competitive oil and gas lease LC 060712 from the shelves. I knew from previous information that lease LC 060712 had been relinquished and I was waiting in the record room until the notation of this cancellation and relinquishment was noted in the tract book in order that I could file an offer to lease for this land. *I observed the said Della Lujan making an entry in the tract book... I later examined this entry and found it to be the notation which cancelled by relinquishment the lease designated as LC 060712. After I observed the said Della Lujan making this entry, I immediately proceeded to the filing room, in order to file an application for a non-competitive oil and gas lease on behalf of Charles C. Loveless, Jr.*
* * * [Italics supplied.]

The affidavit of Henry Cunningham, who filed the oil and gas lease offer for Gonsales, states that sometime between 2:25 p. m. and 2:28 p. m. he also saw Della Lujan remove the tract book from the shelves, and that—

When I observed Della Lujan remove the tract book from the shelves, *I immediately proceeded to the filing room of the Land Office to file the offer to lease the lands formerly embraced in LC 060712 on behalf of Charles B. Gonsales.*
* * * [Italics supplied.]

It will be observed that Cunningham "immediately proceeded" to the filing room as soon as he saw Della Lujan remove the tract book from the shelf. He does not say that he saw any notation being made. Wright apparently waited until he saw "an entry" being made and then he too "immediately" went to the filing room where he filed simultaneously with Cunningham. However, Wright did not examine the entry that he said he saw being made. Therefore, if the entry Wright saw Della Lujan making was not the notation of the relinquishment but some other notation, or if the notation was not actually made at that time but only appeared to be made, the precise time at which

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the relinquishment was noted becomes important in order to determine which occurred first, the notation of the relinquishment or the filing of Gonsales' application.

As the record was not complete on this point, this office requested the land office manager to supply whatever information was obtainable as to what transpired at the time before and after the relinquishment was noted. In response to this request affidavits were received of Delfina Lujan (Della Lujan) and Maria Lourdes Armijo, both employees of the Santa Fe land office on June 22, 1954. Copies of these affidavits were sent to all of the parties, and an opportunity to file any counteraffidavits was allowed.

The affidavit of Delfina Lujan states, in pertinent part, that at about 2:28 p. m. on June 22, 1954, she removed Tract Book No. 21 from the shelf as she and Maria Armijo, her supervisor, were preparing to note the cancellation of the Shockley lease.

* * * Mr. Henry Cunningham and Mr. Hoover Wright were watching us closely, as were Mrs. Eugenia Bate and Mr. George Cochran. These four persons were among the land checkers who were in the Land Office daily.

When Mr. Cunningham saw me remove tract book 21 from the shelf, he left the record room and, as I learned later, went to the accounts section down the hall, where applications were filed in the land office. Mr. Wright followed Mr. Cunningham immediately. Neither Mr. Cunningham nor Mr. Wright waited to see what notation I made in Tract Book 21.

Miss Armijo and I waited about 2 minutes before making the notations necessary to cancel oil and gas lease LC 060712, turning to several other pages first so that those watching would have a more difficult time ascertaining what actual notations we had made. At 2:30 P. M., according to the office clock, I noted the Tract Book that oil and gas lease LC 060712 was cancelled by relinquishment. Miss Armijo made the same notation at the same time in the Serial Register.

Miss Lujan also states in her affidavit that:

I don't recall making any other notation in Tract Book 21 between 2:25 and 2:30 P. M. on June 22, 1954. I did make false motions toward several pages to confuse the land agents watching us.

In substance, the affidavit of Miss Maria Armijo, who was administrative assistant of the land office, repeats the statements made by Miss Lujan. She states that while waiting for the office clock to read 2:30 p. m., she and Miss Lujan looked through the tract book making various comments to each other about other unrelated notations appearing on the tract book in order to confuse any of the record checkers who might be watching, and that neither she nor Miss Lujan had started to note the cancellation of LC 060712 at the time Mr. Cunningham or Mr. Wright left the room.

The four affidavits are completely consistent with the conclusion that the notation was not made until after the Gonsales application

was filed. The affidavits are unanimous that Cunningham left the record room as soon as the tract book was taken down and that he did not wait to see if a notation was actually made. Wright does not claim to have seen the actual notation being made because he did not check it before leaving the record room. He may have seen only the false motions made by Miss Lujan. The evidence seems conclusive then that the notation was not made until after both Cunningham and Wright had left the record room.

The question then comes down to whether, after they left the room, the notation was made before they walked to the filing room and filed their applications. As to this, Miss Lujan's affidavit is that she waited about two minutes after the men left before making the notation. Miss Armijo indicates that there was a time lapse but not how much. These statements are consistent with the official time stamp on the Gonsales application which shows that the application was filed two minutes before the notation was made. There is nothing in the Cunningham and Wright affidavits which necessarily contradicts the time stamp. On the contrary, in their statements that they "immediately proceeded" to the filing room in order to file applications, both men indicate that very little time elapsed between their leaving the record room and their filing of the applications. There is nothing in their affidavits to suggest that over two minutes were required to do this.

The only evidence which would seemingly controvert the fact of premature filing established by the time stamp is an affidavit which has been submitted in the present proceeding on behalf of Gonsales. This is an affidavit dated December 14, 1956, by Joe B. Schutz who states as follows: He was in the record room in the afternoon of June 22, 1954. Some time after 2:30 p. m., he heard that Wright had filed a premature application at 2:28 p. m. Schutz checked the serial register and saw that the notation of cancellation of the Shockley lease had been made at 2:30 p. m.

After I saw this entry in the Serial Register I decided to check the time for myself and walked down the hallway to the filing room which was some distance from the record room. I checked and noted the time on the clock in the filing room. I waited at the filing room until the clock there showed precisely five seconds before the minute and then I ran back to the record room and checked the time I had noted against the time on the clock in the record room. The time shown on the filing room clock was more than two minutes slower than the time shown on the clock in the record room.

In order not to make any mistake, I again went back to the filing room and repeated this procedure allowing for the distance between the two rooms. There was no mistake. There was a discrepancy of more than two minutes in the clocks.

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My statement that the time shown by the clock in the record room was not less than two minutes faster than the time shown by the clock in the filing room is not more exact because I was then interested only in determining whether there actually was a difference of two minutes in the time between the two clocks. This difference was actually more than the two minutes I have stated but I cannot say now exactly how much more.

The purport of the Schutz affidavit is that when the filing room clock registered 2:28 p. m., the record room clock showed a time past 2:30 p. m. Necessarily, then, when the Gonsales application was filed at 2:28 p. m. in the filing room, it was past 2:30 in the record room and the notation had already been made.

One difficulty with the Schutz affidavit is that it speaks of a check made by him some time after 2:30 p. m., how much later he does not say. He states that after Wright returned to the record room he (Schutz) spoke to Wright and was told Wright had filed an application. Within "a few minutes" later, he heard some one else say that Wright had filed prematurely. He then asked Wright at what time his application was stamped in and was told 2:28 p. m. Schutz then went to the serial register and checked it. After that he decided to check the clocks. Following his check, he informed Wright of the results and was later informed that Wright had complained to the land office employees. In Wright's affidavit he said that after filing he returned to the record room and stayed there approximately 30 minutes to an hour. During this time it was brought to his attention (by whom he did not say) that the clocks were not synchronized, and he advised the employees of the land office to that effect.

It thus appears that as much as an hour could have elapsed between the filings and Schutz's test. But whether it was an hour or less, Schutz's test could not conclusively establish that the clocks were not synchronized at the time when the Gonsales application was filed. Schutz states that on many other occasions he has observed a discrepancy between the two clocks. Sometimes one clock was faster; on other occasions it was slower. This would indicate that there was no consistent discrepancy one way so that it could be presumed that because the filing room clock was slow when Schutz checked it, the clock was also slow at 2:28 p. m.

One other point is not clear. Schutz refers to the "clock in the filing room." In Wright's affidavit he stated that on June 23, 1954, the day following the events in question, he had a document stamped in by the "electric stamping device" and that the device was approximately two hours slow when compared with the time "as recorded by the clock in the filing room." This shows that the stamping device was separate and distinct from the clock. Schutz apparently checked the time on the clock, rather than the time recorded by the stamping

machine. If so any discrepancy in the clocks would not indicate any difference in the times recorded by the stamping machine and the clock in the record room.

I can only conclude that no showing has been made by Gonsales which would effectively controvert the facts shown of record, that according to the time stamp on his application his filing was premature. In the absence of such a showing this Department must be bound by the official record.

Gonsales has asked that a hearing be held in the matter or that depositions be taken. He asserts that only in this manner can the facts be established to the satisfaction of all parties concerned. It is probably true that the parties would be more satisfied with determinations of facts made after a hearing. However, hearings in cases of this type are not held as a matter of course but would represent an extraordinary proceeding. As such, they should be held only if there is a reasonable likelihood that they would develop facts which would be decisive of the question at issue. As indicated above, the evidence submitted on behalf of Gonzales in the form of the affidavits of Cunningham, Wright, and Schutz, if fully accepted, would not necessarily overcome the fact of premature filing as shown by the official time stamp. There is no showing that any additional affirmative evidence can be produced by Gonsales. His hopes then must rest, in the event of a hearing, in establishing that the affidavits of Misses Lujan and Armijo are false. He has not shown to date that he has any reason to believe that the affidavits are false.

In the circumstances disclosed by the record—and every opportunity has been extended to Gonsales to submit any evidence that he has—I do not believe that the time and expense required for a hearing or the taking of depositions would be warranted.

I also believe that, since no convincing showing has been made to overcome the effect of the time stamp on the Gonsales application and to show that the application in fact was filed after the notation of the cancellation of the Shockley lease, the Gonsales application was properly rejected by the acting manager as prematurely filed.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision is reversed and the acting manager's decision of October 25, 1954, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

*January 4, 1957***DISTRIBUTION OF RESTRICTED INDIAN ESTATE****Notice**

In proceedings to probate the restricted estate of a deceased Indian of the Five Civilized Tribes in Oklahoma, substantial compliance must be had with the notice provisions of section 3 (b) of the act of August 4, 1947 (61 Stat. 731).

Indian Lands: Descent and Distribution: Wills

The Oklahoma law of wills applies in the case of restricted estates of deceased Indians of the Five Civilized Tribes in all particulars save as modified by the proviso contained in section 23 of the act of April 26, 1906 (34 Stat. 137), as amended.

Indian Lands: Descent and Distribution: Wills

The will of a deceased Indian of the Five Civilized Tribes which was acknowledged and approved as required by section 23 of the act of April 26, 1906 (34 Stat. 137), as amended, can effectively devise restricted lands without regard to any limiting provisions of the Oklahoma law, but such will cannot effectively disinherit a surviving spouse with respect to other types and classes of property.

Indian Lands: Descent and Distribution: Generally

The State courts of Oklahoma are without authority to administer on the restricted estates of deceased Indians of the Five Civilized Tribes, and such courts are likewise without authority to consider and allow claims against the distributive shares of Indian heirs which are restricted by the act of August 4, 1947 (61 Stat. 731).

M-36426**SEPTEMBER 13, 1956.*****TO THE SECRETARY OF THE INTERIOR.**

At your request this office has obtained from the Regional Solicitor, Tulsa, Oklahoma, the entire record of the Bureau's Area Office in the matter of this estate. This action was prompted because Mr. Clem H. Stephenson, Seminole, Oklahoma, has been insisting that the estate of this deceased full-blood Indian be distributed under the provisions of an order of the county court of Okfuskee County, Oklahoma, dated April 17, 1956, which was filed with the clerk of the court on June 21, 1956. This order purports to distribute the estate and allow certain claims against individual distributees. In view of the submission of the record to this office and the questions presented, the Regional Solicitor has advised the Area Director to withhold distribution.

*Not released for publication in time for inclusion chronologically.

This estate has been the subject of protracted litigation since the death of the decedent in 1949. In view of the multiplicity of suits and the complexity of the questions involved, I am setting forth below a summary of the pertinent facts as they appear from an examination of the files.

STATEMENT OF FACTS

Martha Jackson Chisholm died testate on July 9, 1949, leaving an estate valued at \$195,553.98. She was survived by her husband, Buster Chisholm, a full-blood Cherokee Indian, enrollee No. 16300; an adopted son, Eugene Davis, Jr.; a brother, Robert Jackson; and four nephews, Eugene Jackson, Winifred Saber Jackson, Andrew Jackson, Jr., and Kenneth Dale Jackson, the children of a predeceased brother, Andrew Jackson. All of the decedent's collateral relatives, named above, are full-blood Creek Indians.

The decedent's last will and testament, dated June 24, 1949, devised and bequeathed to the surviving husband, Buster Chisholm, 10 acres of restricted purchased land valued at \$6,500; certain household goods and other personal property appraised at \$4,304; and \$10,000 in cash. The will bequeathed one dollar to the adopted son, leaving all of the balance of the estate to the brother and nephews named above, in equal shares. During the lifetime of the testatrix the will had been acknowledged before and approved by the County Judge of Okfuskee County in accordance with the provisions of section 23 of the act of April 26, 1906 (34 Stat. 137), as amended by the act of May 27, 1908 (35 Stat. 315).

On July 11, 1949, the surviving husband filed case No. 3000 in the Okfuskee County Court to probate a purported will which had been executed in 1947. Notice of the pendency of that action was not served on the Superintendent (now Area Director) as required by section 3(b) of the act of August 4, 1947 (61 Stat. 731). On July 14, 1949, Mr. L. V. Hollis, the executor named in the decedent's last will of June 24, 1949, filed in case No. 3000 a contest of the earlier will involved in that case, and at the same time he filed case No. 3002 in which he offered the later will of June 24, 1949, for probate. The sworn statement of Mr. Hollis' attorney shows that copies of these two first pleadings filed by Mr. Hollis on July 14, 1949 were served that day by registered mail on the United States probate attorney at Wewoka, Oklahoma, and copies likewise were mailed to the United States probate attorney at Muskogee, Oklahoma. The cases were consolidated by the court under case No. 3002, and the United States probate attorney at Wewoka, Oklahoma, and his successors in office appeared

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thereafter from time to time and participated in the proceedings as developments occurred. As the litigation progressed over a period of seven years the Area Director made several disbursements out of the decedent's restricted funds in payment of various claims and expenses allowed by the county court in case No. 3002.

The surviving husband, Buster Chisholm, died on July 21, 1949, and Mr. Harry Scoufos was appointed administrator of the husband's estate in case No. 3004. Although that action is still pending, it appears from available information that Buster Chisholm was survived by his father, William Chisholm, a full-blood Shawnee Indian who will be entitled to inherit the entire estate of Buster Chisholm.

Mr. Scoufos, as administrator of the estate of Buster Chisholm, has appeared in his representative capacity in all proceedings relating to the estate of Martha Jackson Chisholm. Mr. Scoufos filed an election to take under the Oklahoma statutes of descent (84 O. S. A., sec. 44). Mr. J. D. Fuller, a former husband of the decedent, who had divorced her in 1940, filed a contest against the probate of the will in which he alleged that he was entitled to one-half of the estate as surviving spouse under the provisions of 84 O. S. A., sec. 44.

The Okfuskee County Court admitted to probate the last will of Martha Jackson Chisholm, dated June 24, 1949, and held that Mr. Fuller was the surviving spouse and was entitled to share in the estate under the laws of succession. The judgment of the county court was affirmed on appeal to the district court. Upon further appeal, the Oklahoma Supreme Court rejected Mr. Fuller's claim and held that Buster Chisholm was the surviving spouse of Martha Jackson Chisholm. (280 P. (2d) 720 (Okla., 1954).)

On April 17, 1956, the County Court of Okfuskee County entered its final decree of distribution in the matter of the estate of Martha Jackson Chisholm. This decree distributes the estate on the theory that the decedent's will is effective to disinherit the surviving husband as to restricted lands, but is ineffective against the husband's rights as a forced heir under the laws of succession with respect to all other classes of property belonging to the decedent. Thus, under the decree, certain restricted lands are distributed to the decedent's brother and four nephews in equal shares of one-fifth each, as provided by the will. All of the rest and residue of the estate (less \$1.00 bequeathed to the adopted son) is distributed; one-half to the administrator of the estate of Buster Chisholm, deceased, and one-tenth each to the decedent's brother and four nephews, named above.

The final decree allows certain costs, executor's fees, and fees to the executor's attorneys. The court also allowed attorneys' fees to the

attorneys for the brother and nephews of the decedent, and also allowed various amounts to these attorneys for advancements allegedly made by them to their clients during the pendency of the litigation and for services allegedly rendered in unrelated matters.

QUESTIONS PRESENTED

The following questions are raised by the record :

1. Whether the probate proceedings are defective for want of compliance with the requirement of service of notice provided by section 3 (b) of the act of August 4, 1947 (61 Stat. 731) ?

2. Whether the probate court correctly applied the law, Federal and state, relating to the testamentary disposition of restricted property by deceased Indians of the Five Civilized Tribes?

3. Whether the probate court exceeded its authority in attempting to distribute restricted property to the administrator of the estate of a deceased full-blood Indian of the Five Civilized Tribes?

4. Whether the probate court exceeded its authority in attempting to allow and direct payment of claims against the distributive shares of full-blood Indians of the Five Civilized Tribes?

These questions will be dealt with in the order listed above.

I

Section 3 (b) of the act of August 4, 1947, *supra*, provides :

(b) The United States shall not be deemed to be a necessary or indispensable party to any action or proceeding of which the State courts of Oklahoma are given exclusive jurisdiction by the provisions of subsection (a) of this section, and the final judgment rendered in any such action or proceeding shall bind the United States and the parties thereto to the same extent as though no Indian property or question were involved: *Provided*, That written notice of the pendency of any such action or proceeding shall be served on the Superintendent for the Five Civilized Tribes within ten days of the filing of the first pleading in said action or proceeding. Such notice shall be served by the party or parties causing the first pleading to be filed. * * *

We are aware of no reported decision involving the statute quoted above. However, in cases arising under similar Federal statutes requiring service of notice on a superintendent in Indian litigation, where the exercise of jurisdiction has been challenged, the courts have inquired first whether the record contains evidence of an attempt to comply with the statutory provision for the service of notice. Where

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there has been a total failure to comply with the requirements of the statute in any particular, the courts have generally regarded the non-compliance as a fatal defect. See *Goddard et al. v. Frazier*, 156 F. 2d 938 (1946); *Collinson v. Threadgill*, 252 Pac. 827 (Okla., 1927). But where there has been substantial compliance with the statute and the party entitled to notice thereunder has failed to interpose timely objection to technical deficiencies, but has participated and acquiesced in the proceedings, the courts have upheld the exercise of jurisdiction notwithstanding technical irregularities in the service of notice. See *Shimonek v. Tillman*, 1 P. 2d 154 (Okla., 1931); *United States v. Thompson et al.*, 128 F. 2d 173 (1942). The latter case is particularly in point, since it involved an interpretation of section 3 of the act of April 12, 1926 (44 Stat. 240), which, like section 3 (b) of the 1947 act, provides a detailed procedure for serving the superintendent with notice of the pendency of litigation affecting the restricted property of Indians of the Five Civilized Tribes. Service of notice on the superintendent in that case was made after the expiration of the 10-day period prescribed by the statute. The United States intervened in the case, removed it to the Federal court, and moved to quash the service of notice. The motion to quash was overruled, and the United States did not thereafter participate actively in the proceedings in the trial court. It was held on appeal that the Government's intervention made it a party to the action and cured any irregularities in the service of notice.

Applying the foregoing principles to the case at hand, it is clear that no objection should now be interposed to the probate proceedings in case No. 3002 for failure to comply strictly with the notice provisions of the 1947 act, *supra*. The statute provides that the party filing the first pleading shall, within 10 days of such filing, serve upon the superintendent for the Five Civilized Tribes a notice of pendency of the action. Meticulous compliance was had with the requirements of this statute except that the notice was addressed to the two probate attorneys in Wewoka, and Muskogee, Oklahoma, instead of the superintendent (now area director) at Muskogee. This service was followed by the appearance and continued participation in the proceedings by the probate attorney, and the disbursement of restricted funds by the superintendent (now area director) during the course of the litigation. For the reasons given, it is believed that the proceedings in case No. 3002 cannot be said to be defective for want of compliance with the provisions of section 3 (b) of the act of August 4, 1947, *supra*.

II

Section 23 of the act of April 26, 1906 (34 Stat. 137), reads as follows:

Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner. [The act of May 27, 1908 (35 Stat. 315), extended the authority to approve such wills to judges of the county courts of the State of Oklahoma.]

In the case of *Blundell v. Wallace*, 267 U. S. 373 (1925), the Supreme Court passed upon the meaning and scope of the above quoted statute. The court reviewed the Congressional policy respecting the Indians of the Five Civilized Tribes and found therefrom that the local law of wills was applicable to these Indians except to the extent that such local law had been modified by the proviso contained in section 2 of the 1906 act, quoted above. The Court observed:

* * * The general policy of Congress prior to the adoption of section 23, plainly had been to consider the local law of descents and wills applicable to the persons and estates of Indians except in so far as it was otherwise provided. * * * Section 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the state supreme court that Congress intended thereby to enable "the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto." The effect of section 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property. * * * it (sec. 23) is without qualification except in the single particular set forth in the proviso; and, clearly, it does not stand in the way of the operation of the local law.

An important part of Oklahoma's "local law of wills" is found in 84 O. S. A., sec. 44, which reads:

* * * but no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law; provided, however, that of the property not acquired by joint industry during coverture the testator be not required to devise or bequeath more than one half thereof in value to the surviving spouse * * *.

It is manifestly necessary to reconcile the statutes, Federal and State, which have been quoted above. The matter was squarely presented to the Oklahoma Supreme Court in the case of *Long v. Darks et al.*, 87 P. 2d 972 (Okla., 1939). The testator in that case was a full-blood Creek Indian whose will had been acknowledged and approved

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as provided by the 1906 act, *supra*. By the terms of the will the surviving spouse was devised and bequeathed property which was less in value than she would have received under the laws of succession. The court said:

* * * It will be observed that the proviso in section 23 relating to full-bloods applies only to the devise of real estate. Personal property is not affected thereby; and as to lands, the proviso could apply to none except that which is restricted by the federal acts. * * * But, unless plaintiff has waived her right to renounce the will and to invoke the provisions of said section, as to all other lands and all personal estate, it would be necessary to reverse the judgment and remand the cause with directions to ascertain the value thereof, and if plaintiff has been denied that portion in value which she would have inherited under the laws of succession, the will should be declared inoperative as to that portion of the estate and the same be distributed accordingly. In making such distribution of the personal estate and the unrestricted lands, the manner of the testamentary disposition of the restricted land or the future income therefrom is entitled to no consideration. That devise occupies a position wholly independent of the state statute.

The court concluded in the *Long* case that the widow was estopped from asserting her rights under the laws of succession because of her conduct in having joined in the action to probate the will, and having accepted benefits thereunder. It is quite clear, however, that the distribution to the widow in accordance with the will was predicated solely on the doctrine of estoppel, the court rejecting in its entirety the idea that the proviso in section 23 of the 1906 act had any application to property other than restricted lands.

Another question has been raised and should be disposed of now. The surviving husband, Buster Chisholm, died shortly after the death of Martha Jackson Chisholm, and before her will was admitted to probate. It has been suggested that he was required by law to elect between taking under the will or under the laws of succession, and that his failure to exercise his personal right of election before he died rendered the court powerless to order distribution to him as a forced heir under 84 O. S. A., sec. 44. We disagree. The statute makes no requirement that the surviving spouse elect between taking under the will or under the laws of succession. In the case of *Bank of Commerce and Trust Company v. Trigg*, 280 Pac. 563 (Okla., 1929), this statute was distinguished from those of other jurisdictions which require the surviving spouse to elect, and which provide for distribution under the will if an election is not made. The court said:

There are numerous decisions holding that where an election is necessary, and where the legatee dies without having made an election, the heirs of the deceased are presumed to take under the will, and not under the statute. All

of these cases, however, in so far as we have been able to ascertain, are based on statutes. * * * In all the states where these statutes prevail, it is uniformly held that, if the wife does not make an election, she is deemed to take under the will. The statutes so provide. These decisions, therefore, are not in point in this state, because we have no such statute.

A contrary view to that expressed in the *Trigg* case would do violence to the language of the Oklahoma statute and, indeed, would reduce it to impotence. The statute expressly limits the testamentary power of a married person for the benefit and protection of the surviving spouse. If, in cases like the one presently under consideration, the survivor's failure to elect were to result in distributing the estate under the will, the very thing prohibited by the statute could be accomplished.

On the basis of the authorities cited above, it is our view that the court was correct in holding that the will of Martha Jackson Chisholm was effective to disinherit the surviving spouse as to restricted lands but was ineffective against the rights of the surviving spouse as a forced heir with respect to all other types of classes of property belonging to the estate.

III and IV

The answer to both of these questions depends upon a single principle of law. The entire restricted estate of Martha Jackson Chisholm passes by inheritance and devise to Indians of the Five Civilized Tribes of one-half or more Indian blood. All such property is classified as restricted by the act of August 4, 1947 (61 Stat. 731). It is well settled in Oklahoma that the restricted property of deceased Indians of the Five Civilized Tribes is not subject to administration by the probate court. See *House v. United States*, 144 F. 2d 555 (1944); *Moore v. Jefferson*, 120 P. 2d 983 (Okla., 1942); *Ryburn v. Carney*, 39 P. 2d 9 (Okla., 1935). Accordingly, it must be concluded that the county court was without authority to order the distribution of restricted property to the administrator of the estate of Buster Chisholm. The court was likewise without authority to order the payment of claims against the distributive shares of the full-blood Indian beneficiaries named in the decedent's will.

RECOMMENDATIONS

It is recommended that the Area Director be instructed to proceed with the distribution of the estate of Martha Jackson Chisholm in accordance with the final decree of the county court of Okfuskee County dated April 17, 1956, except in the following particulars:

1. The restricted property inherited by Buster Chisholm, now deceased, should not be distributed to his administrator

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but should be retained subject to the completion of valid probate proceedings in the matter of his estate.

2. The distributive shares of the decedent's brother and four nephews should be credited to their respective accounts on the books and records of the area office and held subject to supervision in accordance with applicable regulations. Any persons having claims against these distributive shares should be advised by the area office as to the procedure to be followed in presenting their claims to that office for consideration.

J. REUEL ARMSTRONG,
Solicitor.

January 4, 1957.

Approved as recommended

FRED A. SEATON,
Secretary of the Interior

E. O. BISHOP
JOHN O. AND LUCILE V. ANDERSON

A-27397

Decided January 28, 1957

Rules of Practice: Appeals: Service on Adverse Party

An appeal to the Secretary will be dismissed where the appellant has failed to show that he served a copy of his appeal upon an adverse party within the time and in the manner required by the rules of practice, as revised effective May 1, 1956.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

E. O. Bishop has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated June 29, 1956, which affirmed the decision of the manager of the Denver, Colorado, land office, dated April 5, 1956, dismissing his protest against the forest exchange application (Colorado 012124) filed by John O. and Lucile V. Anderson.

The concluding paragraphs of the Director's decision stated that a right of appeal was allowed and that, if an appeal was filed, strict compliance with 43 CFR sections 221.31 to 221.34 was required. The decision also stated that in the event of appeal the adverse party to be served was John O. Anderson. An information sheet was enclosed with the decision which set forth the requirements for taking an appeal.

On August 8, 1956, a notice of appeal from the Director's decision was received from the protestant in the office of the Director. Accompanying the notice of appeal was a letter dated July 31, 1956, from the attorneys representing Bishop which stated that they did not have available the regulations governing appeals to the Secretary and that there might be some technical defect in the appeal. They requested a copy of those regulations and also requested advice as to whether or not the appeal being filed was in proper form.

In a letter dated August 15, 1956, the Director, Bureau of Land Management, informed the attorneys for Bishop that the appeal had been received and had been submitted to the Secretary on that date. The letter also enclosed a copy of the Department's rules of practice which became effective May 1, 1956 (43 CFR, Part 221; 21 F. R. 1860). However, the Director's letter did not advise the attorneys as to whether or not the notice of appeal was in proper form.

In a letter dated November 19, 1956, the office of the Solicitor informed the attorneys for the appellant that in examining the record of the case it appeared that other than a statement in their letter of July 31, 1956, to the effect that copies of the notice of appeal "are being sent to John O. Anderson and Lucile V. Anderson * * *" there was no evidence to show that the adverse parties had been served with a copy of the notice of appeal; that the Department's rules of practice, 43 CFR 221.34, require such service not later than 15 days after the notice of appeal is filed, and also require that proof of such service be filed in the office of the Secretary within 15 days after service on the adverse party unless the proof is filed with the notice of appeal; and that the statement in the letter of July 31, 1956, could not be regarded as sufficient evidence of service on the adverse parties to satisfy the requirements of the regulation. The appellant was thereupon allowed 15 days from receipt of the letter within which to show that the notice of appeal to the Secretary was served on the adverse parties within 15 days after August 8, 1956, the date the notice of appeal was received in the office of the Director. He was informed that such service could be proven by acknowledgment of service by the parties, by a written statement of the person who made the service, if the service was made personally, or by a post office return receipt.

To date no proof of service on the adverse parties has been received, nor has any further communication been received from the appellant or his attorneys. This is despite the fact that the attorneys were advised of the requirements for service and proof of service by the information sheet enclosed with the Director's decision, the copy of

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the rules of practice later sent to them, and the letter of November 19, 1956, from the Solicitor's office.

The Department's rules of practice, 43 CFR 221.98 (b), provide that an appeal to the Secretary will be subject to summary dismissal for failure to serve the notice of appeal within the time required. Inasmuch as the appellant has failed to show compliance with the requirements of the regulation, 43 CFR 221.34, even though given additional time within which to show compliance, the appeal will be summarily dismissed.¹

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeal is dismissed.

EDMUND T. FRITZ,
Deputy Solicitor.

**SCHOOL SECTIONS RESERVED FOR THE TERRITORY OF ALASKA
BY THE ACT OF MARCH 4, 1915 (38 STAT. 1214),
AS AMENDED (48 U. S. C. SEC. 353), AND LIEU
SELECTIONS MADE UNDER THAT ACT**

Alaska: School Lands

The act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. sec. 353), does not authorize the Territory of Alaska to lease to the Department of the Army, or an agency thereof, a school section reserved for the Territory by the act. Absent an act of Congress authorizing the Department of the Army, or an agency thereof, to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States, neither is a qualified beneficiary under the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U. S. C. sec. 869).

Alaska: School Lands—Withdrawals and Reservations: Generally

If a school section reserved for the Territory by the act of March 4, 1915 (38 Stat. 1214), is later withdrawn or reserved for governmental or other purposes, under the lieu selection provision of the act, the Territory may select land in lieu of that withdrawn or reserved, provided that the withdrawal or reservation was made under authority of the act of June 25, 1910 (36 Stat. 847), as amended (43 U. S. C. sec. 142), or other statutory authority. It is immaterial whether the withdrawal or reservation is permanent or temporary.

¹ *Marion F. Jensen et al.*, 63 I. D. 71 (1956); *Garth L. Wilhelm et al.*, 62 I. D. 27 (1955); *Carl V. Gien et al.*, A-27299 (May 31, 1956); *Lee R. Ormiston*, A-27355 (May 14, 1956); *Everta P. Ericson*, A-27264 (March 12, 1956). These cases involved similar provisions of the Department's rules of practice prior to their revision effective May 1, 1956.

Alaska: School Lands—School Lands: Indemnity Selections

The lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), does not authorize the selection of land known to be of mineral character. A reservation of a school section by the act of March 4, 1915, *supra*, bars mining locations on the section so long as the reservation is in effect. Such a reservation, short of an act of Congress, can be extinguished only by an approved selection in lieu of the land reserved.

School Lands: Indemnity Selections

The act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), is not applicable to Alaska.

Words and Phrases

"Federal instrumentality" as used in the act of June 14, 1926, as amended (43 U. S. C. sec. 869), means only such a Federal instrumentality as is authorized by law to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States. "Otherwise appropriated" as used in the lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), includes governmental withdrawals or reservations.

M-36229

FEBRUARY 4, 1957.

TO THE DIRECTOR, OFFICE OF TERRITORIES.

This is in response to your memorandum of April 6, 1956, and attachments, raising the following questions:

(1) May the Department of the Interior issue leases for reserved Alaska school sections or portions thereof to agencies of the Department of Defense and, if so, whether payments received for the use of such lands may be paid to the Territory under the terms of the act of 1915?

(2) If reserved school lands are subsequently withdrawn for permanent military installations, is the Territory entitled to lieu or indemnity selections?

(3) In the case of such permanent withdrawals, what steps can or should be taken to extinguish the Territory's rights to reserved school lands which may be included in the withdrawals?

It appears from a letter dated August 16, 1955, from the Land Commissioner for the Territory of Alaska, addressed to the Bureau of Land Management's Area Administrator for Area 4, Alaska, and the other correspondence, that since June 11, 1941, the Department of the Army has had structures on sec. 16, T. 14 N., R. 2 W., S.M., Alaska; that under leases issued by the Territory rental was being paid by the Department of the Army to the Territory for portions of certain school sections reserved for the Territory by the act of March 4, 1915 (38

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Stat. 1214), as amended (48 U. S. C. sec. 353); and that after the Solicitor's opinion of February 8, 1955 (62 I. D. 22), was rendered, the Department of the Army stopped paying rentals and filed application Anchorage 027871 for a withdrawal of the sec. 16 described above for use by that Department for military purposes. The Territorial Land Commissioner has protested the application and taken steps toward terminating the various leases and to have that Department vacate the reserved school sections now being used by it.

The plat of survey of the portion of T. 14 N., R. 2 W., S.M., containing the sec. 16 was approved July 18, 1917, on which date the reservation made by the act of 1915 attached.¹

I

Concerning Question (1):

As held in the Solicitor's opinion of February 8, 1955 (62 I. D. 22), the leasing provision of the act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. sec. 353) does not authorize the Territory to lease to the Federal Government a school section reserved for the Territory by that act. Consequently, the Territory has no authority to lease such a section to the Department of the Army or to an agency thereof. There is no statute authorizing the Secretary of the Interior generally to enter into leases for public lands and in the absence of such authority, the Secretary has no power to issue leases.² Therefore, it is now necessary to consider the question whether under the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U. S. C. sec. 869), the Secretary may lease or sell to the Department of the Army, or to an agency thereof, a school section reserved for the Territory by the act of March 4, 1915, *supra*. This raises the question whether that Department or an agency thereof is a "Federal instrumentality" within the meaning of that term as used in the amended act of 1926. No departmental or court decision as to the meaning of that term as so used has been found. An examination of the legislative history of the act discloses nothing helpful concerning the meaning of the term, as used in the act.

The word "instrumentality" has been defined as a "condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end,"³ or as "anything used as a means or an

¹ Solicitor's opinion of February 8, 1955 (62 I. D. 22), footnote 1.

² See Solicitor's opinions of July 25, 1955 (62 I. D. 284), and October 22, 1954 (59 I. D. 313); Acting Solicitor's opinion of December 28, 1954 (61 I. D. 459). Departmental ruling of February 24, 1916 (44 L. D. 568).

³ *Falls City Brewing Co. v. Reeves*, 40 F. Supp. 35 (1941).

agency; that which is instrumental; the quality or condition of being instrumental.”⁴ The term “Federal instrumentality” has been defined as “a means or agency used by the Federal Government,” and in the law books the terms “federal agency” and “federal instrumentality” are used interchangeably.⁵ One court has said that “The Federal Government is one of delegated powers, in exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental instrumentality,” and that “Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the Government for the convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government.”⁶

There are many decisions of the United States Supreme Court, each concerning the question whether a particular governmental organization created by or under a certain act of Congress was immune from State taxation because of being an instrument or agency of the Federal Government.⁷ But these decisions are all in the somewhat narrow field of the authority of a State to tax the Federal Government and the word “instrumentality” is construed in its commonly accepted sense. It does not follow as of course that it was so used in the 1926 act. In fact, it has heretofore been concluded that the words “Federal instrumentality” were here used in the sense of a special body to which Congress has seen fit to give rather broad autonomous powers.⁸ And that conclusion is further supported by the fact that the same section of the act, which refers to a “Federal instrumentality” as a possible land purchaser or lessee, does not use the same term in referring to withdrawals made for public uses. There the words “Federal department or agency” are used instead. However, whatever the meaning that Congress intended be given “Federal instrumentality,” clearly there is no intent to authorize the issuance of patents or leases in the name of the United States, to a Federal agency not authorized to acquire and hold title to public lands, or to lease it, in its own name

⁴ 32 C. J. 947.

⁵ *Capitol Building & Loan Ass'n. v. Kansas Comm. of L. & I.*, 83 P. 2d 106 (1938).

⁶ *Unemployment Comp. Comm. v. Wachovia Bank & T. Co.*, 2 S. E. 2d 592 (1939).

⁷ *Cleveland v. United States*, 323 U. S. 329 (1945); *Federal Land Bank v. Bismarck Co.*, 314 U. S. 95 (1941); *Colorado National Bank of Denver v. Bedford*, 310 U. S. 41 (1940); *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477 (1939); *Baltimore National Bank v. Tax Commission*, 297 U. S. 209 (1936); *James v. Dravo Contracting Co.*, 302 U. S. 134, 149 (1937); *Shaw v. Oil Corp.*, 276 U. S. 575 (1928); *Federal Compress Co. v. McLean*, 291 U. S. 17 (1934). Many others can be cited.

⁸ Opinion of Associate Solicitor for Public Lands, dated July 16, 1956, M-36357; memorandum opinion of Acting Assistant Solicitor for Branch of Land Management, dated August 30, 1955, to Lands Staff Officer, Bureau of Land Management.

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rather than in the name of the United States. Otherwise, the United States would be in the position of issuing to itself, patents or leases for public lands—a result certainly not contemplated by Congress. An examination of various statutes fails to disclose any authority for the Department of the Army or any of its agencies to take leases of land in its own name and I am informed that the Corps of Engineers only leases land in the name of the United States. Therefore, neither that Department, nor an agency thereof, is a qualified beneficiary under the act.

I have no alternative but to answer question (1) in the negative.

II

Concerning Question (2) :

The lieu selection provision of the act of March 4, 1915, *supra*, after referring to school sections reserved by the act, reads in part as follows :

* * * where the same may have been sold or otherwise appropriated by or under the authority of any Act of Congress * * * other lands may be designated and reserved in lieu thereof in the manner provided by sections 851 and 852 of Title 43 * * *.

In my opinion the words "otherwise appropriated" include withdrawals or reservations of public lands for governmental or other purposes. The word "appropriated" as applied to public lands frequently has been held to include a withdrawal or reservation of public lands.⁹ My answer to question (2) is that under the lieu selection provision of the act of 1915 the Territory may select land in lieu of school sections reserved by the act and which subsequently have been withdrawn or reserved for governmental or other purposes "by or under the authority of any Act of Congress." However, many withdrawals or reservations¹⁰ of public lands are not made under any statutory authority but are made by the President or his delegate, through the exercise by the President of his non-statutory power to make withdrawals or reservations which the United States Supreme Court has held that he possesses.¹¹ The use of the words "Act of Congress" limits the classes of appropriation to those authorized by law enacted by

⁹ "Appropriated" or "appropriation" as applied to public lands, has been defined as "setting apart of things for some particular use." *Wilcox v. Jackson*, 13 Pet. 498, 38 U. S. 266 (1839). See *McSorley v. Hill*, 27 Pac. 552, 556 (1891); *J. C. Aldrich*, 59 I. D. 176 (1946); *Harkrader et al. v. Goldstein*, 31 L. D. 87 (1901); *Mather et al. v. Hackley's Heirs*, 19 L. D. 48 (1894); *Wilson Davis*, 5 L. D. 376 (1887).

¹⁰ The words "withdrawal" and "reservation" often are used interchangeably where public lands are concerned. See Departmental Instructions of April 9, 1920 (47 L. D. 361) and the case of *United States v. Midwest Oil Co.*, 236 U. S. 459, 476 (1915).

¹¹ *United States v. Midwest Oil Company*, 236 U. S. 459 (1915); also see Attorney General's Opinion of June 4, 1941 (40 Op. Atty. Gen. 20).

Congress. The authority must stem from an act which confers it; not from one which recognizes and confirms it as made under some authority other than that of Congress. Although it has been held that such recognition of the power to make withdrawals is "equivalent to a grant" the case so holding recognized that Congress had not conferred the power by any act.¹² As to a withdrawal or reservation made by the President under his non-statutory power, in view of the words "by or under the authority of any Act of Congress" in the act of 1915, I am unable to hold that a withdrawal or reservation of a reserved school section made under that power of the President creates any rights in the Territory to make lieu selections under the act. Those words are clear and unambiguous, leaving me no choice in the matter.¹³

A "Spot check" of withdrawals of public lands in Alaska for military purposes discloses that most of them have been made under the non-statutory power of the President, rather than under the act of June 25, 1910 (36 Stat. 847), as amended (43 U. S. C. sec. 142), or other statutory authority. Presumably, the authority conferred by that act was not used because withdrawals made thereunder do not bar metalliferous mining locations,¹⁴ while one made under the non-statutory power of the President may bar mining locations, metalliferous or nonmetalliferous, if the words of the withdrawal order show that intent. However, for the reasons set forth in the following paragraph, I am of the opinion that reservations of school sections made by the act of 1915, standing alone, now are sufficient to bar mining locations on such sections in those cases where the Territory elects to await the extinguishment of the withdrawal or reservation made by the President. Consequently, withdrawals of reserved school sections may be made under the act of 1910, as amended, with the only risk being that metalliferous mining locations may be made on the sections if and when lieu selections under the act of 1915 are made by the Territory and approved, upon which event the reservation made by the act would be extinguished.

¹² See footnote 11 above.

¹³ Section 7 of the act of March 3, 1875 (18 Stat. 474), provides for lieu selections by the State of Colorado where school sections "have been sold or otherwise disposed of *by any act of Congress*." [Italics added.] The Secretary ruled on November 20, 1890 (12 L. D. 70) that selections might be made in lieu of school sections withdrawn under the non-statutory power of the President. However, the ruling contains little to support it and I am unable to agree with it. No other such ruling has been found. Soon afterwards the act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), was passed, thus removing the need for further consideration of the question where that act applies.

¹⁴ Section 2 of the act of 1910, as amended (43 U. S. C. sec. 142), provides that lands withdrawn under the act "shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to metalliferous minerals."

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The original act of 1915 (38 Stat. 1214) contained a provision that the reservations made by the act should not be effective as to school sections known on the date of acceptance of the survey to be of mineral character. The act of August 7, 1939 (53 Stat. 1243), amended that act so as to make the reserved school sections and the minerals therein subject to disposition under the United States mining and mineral leasing laws, the proceeds to be set apart as permanent funds in the territorial treasury. The act of March 5, 1952 (66 Stat. 14), repealed the act of 1939 and also amended the act of 1915 by eliminating the portion which confined reservations made by the act to school sections not known on the date of the acceptance of the survey to be of mineral character. The act of August 5, 1953 (67 Stat. 364), further amended the act of 1915 so as to provide for the leasing of those minerals in reserved school sections coming within the scope of the mineral leasing laws of the United States but it included no provision for the disposition of minerals under the United States mining laws. The failure to include such a provision, the broadening of the scope of the reservation provision of the act of 1915 to include the mineral school sections and the repeal of the act of 1939 which had opened the reserved school sections to mining locations, clearly evidence the intent of Congress that after the act of March 5, 1952, *supra*, school sections reserved by the act of 1915 no longer should be open to mining locations. "Although a mining location is not a sale unless and until the owner thereof applies for a patent, when he must pay for the land, the words "reserved from sale or settlement" in the act of 1915 bar mining locations. This is apparent from the lieu selection provision of the act which authorizes selections to be made by the Territory in lieu of those portions of school sections which have been "otherwise appropriated."¹⁵ This is further apparent from the fact that Congress found it necessary to pass the act of 1939 to open the reserved school sections to mining location, which would not have been necessary if "reserved from sale or settlement" did not bar such locations.

Application 027871 invokes no act under which the Department of the Army wishes the withdrawal to be made. However, presumably that Department wishes it made under the non-statutory power of the President, as that Department requests a withdrawal from all

¹⁵ In a decision concerning the words "settlement and entry, or other form of appropriation" in an executive order withdrawing lands, the United States Supreme Court held that "appropriation" included appropriation by mining location. *Mason v. United States*, 260 U. S. 545, 554 (1923).

forms of appropriation under the public land laws, including the United States mining and mineral leasing laws. The withdrawal might be made under the act of June 25, 1910, *supra*, which could be done without risk of valid metalliferous mining locations being made on the school section involved, until such time as the Territory might give up its rights to the section by making a lieu selection and obtaining departmental approval thereof.

The section here in question, even if it should be withdrawn for a public purpose, would still be subject to the overhanging or continuing reservation made by the act of 1915. That Congress intended the reservation to be a continuing one effective immediately upon the removal of any legal bar to its attachment, is indicated by the provision in the act as amended by the act of March 5, 1952, *supra*, that the reservation should not affect any lands within "an existing reservation of or by the United States, or lands subject to or included in any valid application, claim, or right" unless and until "the reservation, application, claim, or right is extinguished, relinquished, or cancelled." A reservation of the land for the use of the United States takes precedence over but does not completely annul the reservation for the Territory so as to prevent the latter from applying once the Federal reservation is vacated. On the other hand, there is no reason why the Territory, if it so desires, may not in lieu of awaiting termination of the withdrawal, apply for other land in lieu of that withdrawn.

Section 1 of the act of June 25, 1910 (36 Stat. 847; 43 U. S. C. sec. 141), authorizes the President to withdraw public lands "temporarily" but the section provides further that such withdrawals "shall remain in force until revoked by him or by an act of Congress." Therefore, at the will of the President or of the Congress, a withdrawal made under the act could exist indefinitely and in practical effect be permanent. However, as far as lieu selection rights of the Territory under the act of 1915 are concerned, it is immaterial whether a withdrawal of a school section is a temporary or a permanent one.¹⁶

My answer to question (2) is that the Territory is entitled to exercise lieu selection rights under the act of 1915 where a reserved school

¹⁶ Either a temporary or permanent withdrawal of school section lands entitles a State to make lieu selections under the general act of February 28, 1891 (43 U. S. C. secs. 851, 852). See Departmental Instructions of April 9, 1920 (47 L. D. 361); Departmental Decision of April 18, 1931 (53 I. D. 365); *United States v. Morrison*, 240 U. S. 192 (1916). I think the same rule applies to lieu selection rights under the act of 1915.

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section is later withdrawn for governmental purposes "by or under the authority of any Act of Congress." Further, it is immaterial whether the withdrawal is permanent or temporary.

III

Concerning Question (3):

I think that it is clear from the provision in the act of 1915, authorizing selections by the Territory "in lieu" of reserved school sections, and from the provisions of 43 CFR 76.2 and 43 CFR 270.4, that upon secretarial approval of a lieu selection made under the act, the Territory's claim to such portions of a reserved school section as are assigned as a basis for the selection is extinguished. Aside from such approval, I know of no means of extinguishing the Territory's claim to a school section reserved by the act, short of an act of Congress.

IV

The following questions have been asked, which I will designate questions (4) and (5), and which I will now answer:

(4) Does the lieu selection provision of the act of 1915 authorize the Territory to select public lands which on the date of selection are known to be mineral in character, in lieu of a withdrawn school section, mineral or non-mineral, reserved by the act?

(5) Is the general school land indemnity act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), applicable to Alaska?

Concerning Question (4):

In view of the amendment to the act of 1915, made by the act of March 5, 1952, *supra*, the reservation made by the act of 1915 is no longer restricted to school sections not known on the date of acceptance of the survey to be of mineral character and now it may include mineral school sections. But neither the act of 1952 nor any other act amending the act of 1915 made any change in the lieu selection provision of the act, and it remains as it was in the original act of 1915. That provision is silent as to the character of the lands that may be selected.

It has been the settled policy of Congress to dispose of mineral lands only under laws including them.¹⁷ Therefore, the silence of the lieu selection provision of the act of 1915 as to the character of the land that may be selected by the Territory cannot be construed as impliedly

¹⁷ *United States v. Sweet, Administrator of Sweet*, 245 U. S. 563 (1918).

authorizing the selection of lands known to be of mineral character. Moreover, had Congress intended that the act of March 4, 1952, *supra*, making mineral school sections subject to reservation by the act of 1915, as amended, should also make mineral lands subject to lieu selection, in all probability provision therefor would have been incorporated in the act of 1952. Such a change cannot be held to have been implied by the act of 1952. There is a presumption against the implied amendment of any existing statutory provision.¹⁸ An amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied.¹⁹ Therefore, I answer question (4) in the negative.

V

Concerning Question (5) :

Section 8 of the act of May 17, 1884 (23 Stat. 24), provides that the laws of the United States relating to mining claims and the rights incident thereto shall be in full force and effect in Alaska but provides further that nothing in the act shall be construed as putting into force in Alaska the "general land laws of the United States." Section 27 of the act of June 6, 1900 (31 Stat. 330; 48 U. S. C. sec. 356), contains a similar provision with respect to the general land laws of the United States.

The general school land indemnity act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), authorizes the selection by a State or Territory of "unappropriated, surveyed public lands, not mineral in character, within the State or Territory" in lieu of sections 16 and 36 where those sections are "reserved to any Territory" and also are within "a military, Indian or other reservation, or are otherwise disposed of by the United States."

Section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 23), provides in part that "The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." By virtue of this provision, the general right-of-way acts of March 3, 1891 (26 Stat. 1095; 43 U. S. C. secs. 893, 946), February 15, 1901 (31 Stat. 790; 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253; 43 U. S. C. sec. 961), and the general Indian Allotment Act of February 8, 1887 (24 Stat. 388; 25 U. S. C. sec. 331), have been held to have been extended to Alaska.²⁰ Hence, the question

¹⁸ Section 1930, page 414, *Sutherland on Statutory Construction*, 3d Edition.

¹⁹ See footnote 18 above.

²⁰ 30 Op. Atty. Gen. 387; 43 CFR Part 51, 74.25. *Nagle v. United States*, 191 Fed. 141 (9th Cir. 1911). See Secretary's opinion of February 25, 1932 (53 I. D. 593).

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arises whether the general act of February 28, 1891, *supra*, has been similarly extended to the Territory.

Possibly the act of February 28, 1891, *supra*, might be held to be "locally inapplicable" to Alaska within the meaning of the act of 1912 because the act of 1891 could not operate in the Territory when the act of August 24, 1912, *supra*, was passed.²¹ Until the passage of the act of March 4, 1915 (38 Stat. 1214), there existed no general act either reserving or granting to the Territory any sections 16 and 36 for the benefit of its common schools. Hence, prior to March 4, 1915, there could be no loss to the Territory of lands in those sections, which would have entitled the Territory to lieu selections, even if the act of 1891 were applicable to Alaska. However, whether or not the act of 1891 was "locally inapplicable" because it could not operate when the act of 1912 was passed need not be decided, as I am convinced from a thorough consideration of the legislative history of the various bills, one of which became the act of March 4, 1915, *supra*, soon after the act of 1912 was passed, that Congress neither considered the act of 1891 extended to Alaska by the act of 1912 nor intended the act of 1915 to have that effect.

During the second session of the 63d Congress, two bills were introduced in the House,²² each of which provided for reserving and granting to the Territory of Alaska, upon survey, sections 16 and 36. Each bill provided for the Territory to make lieu selections and expressly provided that "the provisions of" the act of February 28, 1891 (26 Stat. 791) "are hereby made applicable thereto." In the third session of the same Congress, identical bills were introduced in the House and Senate,²³ respectively, providing for the reservation of school sections for the Territory and for the lieu selections to be made "in the manner" provided by the act of 1891, instead of expressly making the provisions of that act applicable to lieu selections. One of those bills, S. 7515, was enacted as the act of March 4, 1915, *supra*, without change in the lieu selection provision of the bill. A thorough examination of the legislative history of the bills fails to disclose the reason for the change in wording of the lieu selection provisions in the bills as introduced in the second session, to that contained in the two bills introduced in the third session. Apparently, the change was made because

²¹ An act similar to the act of August 24, 1912 (48 U. S. C. sec. 23), was held not to have extended certain general acts, applicable only to surveyed lands, to the Territory of Oregon because no surveys therein had been authorized by the Federal Government. *Stark v. Starrs*, 73 U. S. 402 (1867).

²² H. R. 15870 and H. R. 17262.

²³ H. R. 20851 and S. 7515.

Congress decided merely to adopt the methods and procedures authorized by the act of 1891 and the regulations thereunder, rather than make the lieu selections of that act applicable to lieu selections made under the act of 1915. This conclusion is supported by the meaning of "manner" as generally construed, namely, that it means the method of doing a thing; or method of procedure or execution.²⁴ I find nothing in the act of 1915 indicating that Congress intended "manner" in that act to have a meaning different than that ordinarily given it. At any rate, it is a well established rule that changes made in a bill during its consideration if later reflected in the law are made with a purpose and the change here under consideration can only mean that rather than extend the 1891 act, Congress decided to extend the procedural parts of it only. No other reason for the change is disclosed in the history of the legislation. Therefore, my answer to question (5) is in the negative.

J. REUEL ARMSTRONG,
Solicitor.

APPEAL OF TRI-STATE CONSTRUCTION CO.

IBCA-63

Decided February 26, 1957

Contracts: Unforeseeable Causes—Contracts: Delays of Contractor—Contracts: Damages: Unliquidated Damages

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the contractor within the meaning of the "delays—damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does not necessarily depend on a determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.

²⁴ See *Melsheimer v. McKnight*, 46 So. 827 (1908); *United States v. Watashe et al.*, 117 F. 2d 947 (10th Cir. 1941); *People v. English*, 29 N. E. 678 (1892); *Cover et al. v. Connolly et al.*, 121 P. 2d 55; 55 C. J. S. 663.

*February 26, 1957***Contracts: Additional Compensation—Contracts: Appeals**

The Board of Contract Appeals lacks jurisdiction to consider a claim for additional compensation when no appeal was taken from the contracting officer's decision rejecting the claim within the time specified in the "disputes" clause of the contract.

Contracts: Appeals—Contracts: Comptroller General—Contracts: Payments

When a contracting officer withheld from payments due under a contract sums to cover contingent liabilities of a contractor by reason of alleged labor violations being investigated by him and by the Department of Labor, but made no findings of fact with respect to the alleged labor violations and merely informed the contractor that the matter was being referred to the Comptroller General, and when the contractor never requested the contracting officer to make findings of fact with respect to the alleged labor violations and did not complain of the withholding in its notice of appeal, but only in a subsequent brief, neither the issue of the alleged labor violations nor the propriety of the withholding is properly before the Board of Contract Appeals. The submission of the matter to the Comptroller General did not constitute a finding of fact or decision within the meaning of the "disputes" article of the contract, or of the regulations of the Board.

BOARD OF CONTRACT APPEALS

On November 10, 1955, the Tri-State Construction Co., of Portland, Oregon, filed a notice of appeal from the findings of fact and decision of the contracting officer, dated October 14, 1955, which denied the contractor's request, dated October 5, 1954, for an extension of time of 43 calendar days for the completion of Contract No. 14-03-001-10969, entered into on June 2, 1954, with the Bonneville Power Administration, hereinafter referred to as Bonneville.

The contract, which was on U. S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of U. S. Standard Form 23A (March 1953), provided for the construction of the Forest Grove-Timber 115-KV Transmission Line.

Under the terms of the contract the completed line was to be delivered 130 calendar days after the date of notice to proceed, which was given on June 7, 1954. The line was finally completed on November 27, 1954, or 43 calendar days beyond the scheduled completion date. The contract provided for the assessment of liquidated damages at the rate of \$100 per day for each calendar day of delay beyond the established completion date,¹ unless such delay were found to be excusable. In his findings of fact and decision the contracting officer

¹ See paragraph (b) of clause 5 of the General Provisions, and paragraph 1-104 of the contract specifications.

determined that liquidated damages should be assessed for 43 calendar days of unexcusable delay, or in the total amount of \$4,300.

The basis of the contractor's request for an extension of time is that the delay was caused by a strike of its linemen and groundmen on August 23, 1954, and the concomitant establishment of a picket line, beginning August 26, 1954, by Local 125 of the International Brotherhood of Electrical Workers. The strike was called because on August 20, 1954, the contractor's crews had been informed that they would no longer be paid for time spent in traveling from their assembly point to the site of actual work. The jobsite appears to have been picketed during the whole of the remaining period of construction, but the contractor was, nevertheless, able to secure, although with great difficulty, sufficient men to complete the work.²

To be excusable, the contractor must show, as provided in clause 5 (c) of the contract, that the delay in the completion of the work was "due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including but not restricted to various named causes among which strikes are mentioned specifically.

The appellant argues that the strike was not a foreseeable consequence of its refusal to continue to pay its employees travel time. It contends, on the one hand, that its refusal was lawful and represented a legitimate dispute with its employees, and, on the other hand, that the conduct of the union, which it asserts was not a certified bargaining agent in accordance with the provisions of the Labor Management Relations Act of June 23, 1947,³ and was engaged in picketing in violation of the laws of Oregon, was unlawful. The appellant also argues that in any event the contracting officer had no authority to determine the cause of the strike but was bound to grant an extension of time once it was shown that the delay had been caused by the strike.

The record shows that the Regional Director of the National Labor Relations Board did refuse, for lack of sufficient evidence, to file charges of unfair labor practices against the contractor. But the Board does not deem it necessary to determine whether the conduct of the contractor was lawful and the conduct of the union was unlawful under the provisions of either Federal or State law. The contractor has misconceived the issue, which, under clause 5 (c) of

² See the contractor's letter dated January 19, 1955, to Bonneville, in which the extension of time of 43 days was requested.

³ 61 Stat. 136; 29 U. S. C., 1952 ed., sec. 141 *et seq.*

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the contract, is not necessarily one of legality but of foreseeability. For present purposes, the Board will assume that the conduct of the contractor was lawful but that does not dispose of the question whether the strike, with its consequences, was unforeseeable.

In *United States v. Brooks-Callaway Co.*, 318 U. S. 120 (1943), the Supreme Court held that the causes of delay specifically enumerated in the provision excusing the contractor for delay were not unforeseeable *per se*. Said the Court: "The purpose of the proviso to protect the contractor against the unexpected, and its grammatical sense, both militate against holding that the listed events are always to be regarded as unforeseeable, no matter what the attendant circumstances are. Rather, the adjective 'unforeseeable' must modify each event set out in the 'including' phrase."

It follows that the mere fact that strikes are among the enumerated causes of delay does not make every strike and its consequences unforeseeable, and that the contractor must show that they were unforeseeable in fact. Moreover, clause 5 (c) expressly provides that causes of delay which are within the control of the contractor or due to his fault or negligence are not to be regarded as unforeseeable. Now, while it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of his work. In such a case, he must choose between the exercise of his legal rights as an employer, and the danger of defaulting on his obligation as a contractor.

In the case of a strike that an employer has himself precipitated, the burden must rest on him to show that it was unexpected. It is conceivable that a strike, which could not reasonably be foreseen, may result from the conduct of an employer, as, for instance, if a strike were to follow from the failure of an employer to reply to an employee's "Good Morning," but such cases must necessarily be rare. On the other hand, it would seem to be apparent that as a rule any strike resulting from a sudden change in an important term or condition of employment is foreseeable. As the change can be made only by the employer, it is clearly within his control, and if it is made under circumstances which indicate that it will provoke a strike, the employer's judgment in making the change must be regarded as faulty.

The record in the present case shows that prior to the occurrence of the strike the contractor had good relations with its employees, and

rapid progress on the performance of the contract was being made. Indeed, from June 10 to August 20, 1954, construction had progressed so satisfactorily that 75.6 percent of the work had been completed, although only 56.9 percent of the performance time had elapsed. On August 20, 1954, however, C. H. McGarr, who had been the superintendent on the job from its commencement was replaced by a new superintendent, E. Michael O'Callaghan, who proceeded to inform the contractor's employees that they would no longer be paid for travel time. Even if the men had been wholly unorganized, and belonged to no union whatsoever, it is apparent that trouble was to be expected. The payment for travel time was an important term or condition of employment, and a sudden decision to discontinue such payment was bound to lead to resentment. However, the members of the contractor's crews appeared to belong to Local 125, and the local appears to have had collective bargaining agreements with many contractors in the area. Moreover, shortly after the contractor had commenced operations, the local had written to it to state: "The bearer, L. C. Taylor, will act as Steward for your job until further notice from this Local Union,"⁴ and the contractor's superintendent appears to have agreed that the job would be worked in accordance with union rules.⁵ And, finally, it appears that the practice of paying employees for travel time was consistent with the terms of a contract between the Northwest Line Constructor's Chapter of the National Electrical Contractor's Association and the local unions, including Local 125.⁶ In these circumstances, it is all too obvious that it was to be expected that the termination of the practice of paying for travel time would lead to a strike. It is a matter of common experience that the reach of collective labor agreements often extends far beyond the terms of their technical validity, and that even non-union employers must reckon with them. Certainly it is true that where a practical working arrangement with a union has been made, the absence of a formal contract is no guarantee against trouble.

In the light of the record, the Board must conclude that the strike was foreseeable within the meaning of clause 5(c) of the contract, and

⁴ See letter dated June 14, 1954, from Local Union 125, International Brotherhood of Electrical Workers, to the contractor.

⁵ See memorandum dated May 28, 1954, from Bonneville's Branch of Construction to James D. Bell, Chief of the Transmission Line Construction Section, which indicated that one of the contractor's representatives had stated not only that McGarr would be the superintendent on the job, but also that he had "an agreement with the electrical workers that they would work the job according to their union contract."

⁶ See letter dated December 30, 1954, from the chapter to W. Dale Eddington, the Bonneville Labor Relations Officer, transmitting statement showing that the contractors in the area adhered to the practice of paying for travel time.

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that liquidated damages for the contractor's delay in the completion of the work were properly assessed by the contracting officer. He also found that even if the strike could be regarded as unforeseeable the delay would have to be regarded as inexcusable because of the contractor's failure to maintain adequate superintendence on the job and an organization and plant capable of completing the work on time.⁷ However, if such failure occurred, it was subsequent to the strike, and it would have been excusable if the strike itself had been excusable. Therefore, the second ground upon which the contracting officer relied does not present an independent ground for either granting or denying relief.

In its brief the contractor also asserts a claim in the amount of \$8,384.17 for extra work in replacing damaged cable. This claim was denied by the contracting officer in a finding of fact and decision dated March 16, 1955, from which the contractor did not take an appeal within the time specified in clause 6 of the contract, relating to disputes. The Board, therefore, lacks jurisdiction to consider the claim.⁸

The contractor also complains that the contracting officer has withheld from payments due under the contract the sums of \$280 and \$1,735.38 to cover contingent liabilities of the contractor under the Eight Hour Laws⁹ and the Davis-Bacon Act,¹⁰ respectively. The record shows that the contracting officer had long prior to the withholding had under investigation the labor practices of the contractor, and had reported alleged violations of law to the Department of Labor which has also been conducting an investigation which apparently is still continuing. In a letter dated October 14, 1955, which accompanied his findings of fact and decision with respect to the contractor's request for an extension of time for the performance of the contract, the contracting officer informed the contractor that a balance was being withheld from the payment due under the contract to cover contingent liabilities which included penalties for the alleged labor violations, and that the balance was being transmitted to the General Accounting Office with a request that it determine its disposition. The contracting officer concluded this letter by stating:

You may appeal the decision on the time extension to the Board of Contract Appeals. * * * You may also present your claims to the General Accounting Office for the money sent to them.

⁷ These requirements were imposed by paragraph 2-101 of the specifications.

⁸ See 43 CFR 4.16, and compare *Emasco Manufacturing Co.*, 63 I. D. 92 (1956); *Wiscombe Painting Co.*, IBCA-78 (October 26, 1956).

⁹ 40 U. S. C., 1952 ed., sec. 321 *et seq.*

¹⁰ 40 U. S. C., 1952 ed., sec. 276a *et seq.*

In its appeal the contractor merely stated that it was appealing from the contracting officer's "decision or findings of fact" which, as already stated, was limited to the requested extension of time. Moreover, while the contractor might have requested the contracting officer to make findings of fact with respect to the alleged labor violations, it has so far failed to do so. The issue of the alleged labor violations was, as in the case of the damaged cable claim, interjected only in the contractor's brief. It is apparent, therefore, that neither this issue nor the propriety of the withholding is, on the present record, properly before the Board. The submission of the matter to the Comptroller General did not constitute a finding of fact or decision within the meaning of the disputes article of the contract, or of the regulations of the Board.¹¹

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings and decision of the contracting officer are affirmed.

WILLIAM SEAGLE, *Member*.

I Concur:

THEODORE H. HAAS, *Chairman*.

HERBERT J. SLAUGHTER, *Member*.

APPLICABILITY OF STATE COMMUNITY PROPERTY LAWS TO FEDERAL OIL AND GAS LEASES WITH RESPECT TO ACREAGE LIMITATIONS

Oil and Gas Leases: Generally—State Laws

State community property laws should not be considered in determining the acreage chargeable to a holder of oil and gas leases because (1) they are governed exclusively by Federal law, (2) since their applicability has not been authorized by Congress their application would be contrary to the Constitution of the United States, and (3) the lessee's obligation is in the nature of a contractual obligation which can only be transferred with the approval of the Secretary of the Interior.

Oil and Gas Leases: Generally—State Laws

The State laws applicable to Federal oil and gas leases are limited to those classes of laws authorized or recognized by section 32 of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*) as amended.

¹¹ *Gila Construction Company, Inc.*, 63 I. D. 378 (1956).

*February 27, 1957***Oil and Gas Leases: Assignments or Transfers**

Title to or interest in an oil and gas lease may only be assigned or transferred subject to the approval of the Secretary of the Interior.

M-36416**FEBRUARY 27, 1957.****TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.**

On January 25, 1957, you asked for my opinion on the following questions:

"1. Whether community property laws should be considered in determining whether a lessee has violated the acreage limitations of 30 U. S. C. sec. 184 (Supp. III, 1956) ?

"2. Whether the limitation if any on acreage to be held by husband and wife as community property would be the same as the limit on a person or association, i. e., 46,080 acres as to oil and gas?

"3. Whether the presumptions raised in the community property laws, e. g., that property taken in the husband's name is community property, should be considered conclusive, or whether a person may rebut such presumptions—as by showing that a lease was separate property?"

You also asked whether

"4. If the husband and wife hold the maximum acreage permitted by law, may additional acreage be held in trust for their minor children?"

which is a separate question and which will be the subject of a separate opinion.

The first question, upon the answer to which the answer to the second and third questions depend, is one that appears not to have been specifically decided by the Department, at least in any reported case. In practice the community property laws of the various States have not been invoked in the computations of acreage holdings. Each individual lease offeror (formerly applicant), whether male or female, married or unmarried, has always been required to furnish a statement as to his (or her) individual acreage holdings.

When Congress provided by law for the issuance of oil and gas leases on the lands belonging to the United States, it exercised the power conferred on it by the Constitution (Art. IV, Sec. 3, Cl. 2) "to dispose of and make all needful rules and regulations respecting" the lands of the United States. That power is exclusive "and that

only through its exercise in some form can rights in lands belonging to the United States be acquired." *Utah Power and Light Company v. United States*, 243 U. S. 389 (1917). The same case held that whatever power a State has with respect to such lands its

* * * jurisdiction does not extend to any matter that is not consistent with full power in the United States * * *, to control their use and to prescribe in what manner others may acquire rights in them. Thus, * * * the State * * * may not tax the lands themselves or invest others with any right whatever in them.

Community property laws in general do not require any transfer as between the parties. Instead title under them vests by operation of law. Therefore, if they apply at all it results that the wife becomes invested by operation of law with a one-half interest in an oil and gas lease issued to the husband who applies to the United States in his own name and right without any assignment or other form of transfer from him to her.

Such an investiture can only be reconciled with the principle stated in *Utah Power and Light Company v. United States*, *supra*, if provided for in the Federal statute or if the State law is wholly consistent with the Federal law.

The Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*) as amended, is a comprehensive law providing for the disposal of certain federally owned mineral deposits by lease. It does not contain any provision making community property laws applicable to mineral permits or leases. Section 32 of the act reserves to the States or other local authority the right "to exercise any rights they may have, including the right to levy and collect taxes" upon certain property rights of lessees. But it limits the effect of State legislation to that enacted under "rights which they may have." Only within the framework of their authority as it then existed may the laws enacted by the States apply.

The Leasing Act provides in section 1 for disposal of the minerals to "citizens of the United States, or to any associations of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, * * *." Section 27 of the act limits the acreage that may be held by a single lessee or permittee. Section 30a requires that any assignment of all or any part of a lease be approved by the Secretary of the Interior. Section 32 authorizes the Secretary of the Interior to prescribe "necessary and proper rules and regulations" and to do whatever else is necessary to "carry out and accomplish the purposes of the act." Pursu-

February 27, 1957

ant to that authorization, the Secretary has deemed it necessary to prescribe as to oil and gas lease offers, the requirement in 43 CFR 192.42 (d) (3) that each offeror must state as a part of his offer that he does not hold acreage in excess of that prescribed by the law. The same section requires the offeror to state his citizenship. Other regulations provide similarly with respect to the showing required of applicants for leases for other minerals. The same facts must be determined before an assignment of a lease may be recognized.

Since proof of the facts required by the act to be established must be made by the statement of each individual offeror, whether there is only one or an association, it is obvious that there is no way in which one individual, acting alone can apply for and obtain a lease which from and after its actual issuance will not be owned by him alone but will be held in equal shares by him and another individual, the facts as to whose citizenship and acreage holdings are unknown to the lessor, except as the latter may be implied from a consideration of the laws of the State. But recourse to those laws for such a purpose in the absence of direction to do so by Congress would be inconsistent with that body's exclusive right to dispose of the mineral property by lease.

The rule with respect to the question whether the title to Federal land has passed must be resolved by the laws of the United States. It is only after title has passed that the property becomes subject to the operation of State laws. *Wilcox v. Jackson*, 13 Pet. 498, 517, 38 U. S. 266 (1839); *Bernier v. Bernier*, 147 U. S. 242 (1893). This rule was applied in *McCune v. Essig*, 199 U. S. 382 (1905) and *Wadkins v. Producers Oil Company*, 227 U. S. 368 (1913), in both of which it was held that the right to a homestead entry passed to the widow, if any, upon the death of the entryman pursuant to the mandate of the Federal law and the State community property law did not apply and, in the latter, that if the death of the wife preceded that of the entryman no estate in the entry descended to her heirs under the community property laws of the State. Concededly there are differences between a homestead entry and an oil and gas lease but there is the striking similarity that the holder of either is bound under the Federal law to perform certain acts in order to keep his estate alive. In each case his duties are prescribed by that law and his rewards are authorized by it. In a sense each is a contractual relationship under which personal liabilities and obligations are created. In neither case is the United States divested of title to the land. It is

true, as to the lease that title passes to the minerals but only after they have been severed from the realty and then only as to part of them unless royalty is paid in cash. However, we are not here concerned with the ownership of the minerals after they have been severed from the realty and have become personal property.

Thus, consideration of State community property laws in determining Federal acreage holdings in oil and gas leases is precluded because:

(1) the leases are governed by Federal law and application to them of State law is not authorized by the Mineral Leasing Act or other Federal law;

(2) application of the State law for such a purpose would prevent compliance with express provisions of the Mineral Leasing Act;

(3) absent express or implied authorization by Congress application of the State law would be contrary to the Constitution of the United States; since the leases involve lands and interests in lands title to which is still in the United States (note above, that title to the oil and gas vests only upon severance);

(4) the obligations under the lease are the personal obligations, contractual in nature, of the person named in the instrument as the lessee and may only vest in another after the transfer has been approved by the Secretary of the Interior.

Your second question does not require further answer because on the basis of what has been said if the leases involved are issued separately to the husband and to the wife, each would be separately chargeable with his or her own acreage. If issued to both under joint offer they would be treated as an association, the authorized holdings of which in any State would be 46,080 acres. In the latter case each could hold in his (or her) own right 23,040 acres in addition to the acreage held by both together.

It is also unnecessary to answer your third question since it does not apply.

J. RUEEL ARMSTRONG,
Solicitor.

**THE SUPERIOR OIL COMPANY AND
THE BRITISH-AMERICAN OIL PRODUCING COMPANY**

IA-697

*Decided March 8, 1957***Indian Lands: Leases and Permits: Oil and Gas**

Where an Indian tribal oil and gas lease provides for a term of 10 years and as much longer thereafter as oil and/or gas is produced in paying quantities, upon failure of production after the primary period the lease terminates by its own terms.

Indian Lands: Leases and Permits: Oil and Gas—Oil and Gas Leases: Rentals

Neither the payment of advance rentals nor their receipt by departmental officials upon a lease which had terminated can continue or reinstate the lease.

Indian Lands: Leases and Permits: Oil and Gas—Oil and Gas Leases: Suspension of Operations and Production

Under an Indian tribal oil and gas lease which provided as a condition to its existence that oil and gas be produced in paying quantities, upon a cessation of production no authority is vested in the Secretary of the Interior to allow a suspension of operations and thereby continue the term of the lease.

APPEAL FROM THE COMMISSIONER OF INDIAN AFFAIRS

The Superior Oil Company and The British-American Oil Producing Company have, through their attorney, appealed from a decision by the Commissioner of Indian Affairs, dated December 19, 1955, which in effect affirmed a decision dated March 8, 1955, by the Area Director, Billings Area Office, Bureau of Indian Affairs, whereby the appellants were notified that an Indian tribal oil and gas mining lease held by them (I-96-Ind. 6800) had terminated because of a failure to produce oil and/or gas in paying quantities.

The lease in question, made and entered into on October 11, 1941, was approved by the Assistant Secretary of the Interior on January 3, 1942. The lease originally covered 280 acres¹ of Shoshone and Arapahoe tribal lands in Wyoming. The lease specified a term of "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land," and for the payment, as royalty, of a percentage of the value or amount of oil and gas produced from the leased land. The primary term of the lease expired January 2, 1952. The record shows that a gas well was completed on the land held subject to the lease during the latter part of December 1951. Copies of reports from the Regional Oil and Gas Supervisor, Geological Survey, are to the effect that the well in question produced gas through Febru-

¹ After August 7, 1946, the lease was canceled except as to 160 acres described as the NE/4, sec. 33, T. 3 N., R. 1 W.

ary 1953,² after which the well was "choked off by water" and no effort apparently was made thereafter to develop the land for mining purposes. Since the last period of production was during the year 1953, the advance acreage rentals paid by the appellants for the years 1954 and 1955 were ordered refunded to the appellants.

The appellants state that realizing the close proximity of the expiration date of the primary term, and appreciating the possibility of not being able to market the gas from the well in question and not knowing how permanent the production would be, an application was filed by them on December 26, 1951, for suspension of production and the continuance of the lease. While this application was submitted on the basis of the departmental oil and gas operating regulations (30 CFR 221.14),³ the Acting Director of the Geological Survey referred the matter to the Commissioner of Indian Affairs with the opinion that section 221.14 of the operating regulations did not constitute authority to waive the condition to the continuance of the lease beyond the primary term that oil or gas must be produced in paying quantities. The Commissioner of Indian Affairs concurred in this view in his decision of December 19, 1955.

The primary or fixed period of the above lease had expired. Moreover, the only condition upon which that instrument might have been continued after the primary period was by the production of oil or gas in paying quantities, and unless such a condition of the lease is met the lease terminates, not by forfeiture, but by expiration of the period fixed by the contract of the parties.⁴ Thus, since the lease in question terminated when gas was no longer being produced in the year 1953, the advance acreage rentals which thereafter appear to have been paid for the years commencing January 3, 1954, and January 3, 1955, should be refunded. While a reference is made by the appellants to the payment of those rentals and their receipt by field officials of this Department, no effect can be imputed to such action as continuing the lease. In fact, the lease itself provides that such rentals are payable only during its continuance. Moreover, upon the termination

² The following gas production by months was reported:

December 1951-----	801, 000 c. f.	August 1952-----	817, 000 c. f.
January 1952-----	2, 117, 000 c. f.	September 1952-----	1, 109, 000 c. f.
February 1952-----	2, 148, 000 c. f.	October 1952-----	1, 264, 000 c. f.
March 1952-----	1, 618, 000 c. f.	November 1952-----	902, 000 c. f.
April 1952-----	1, 125, 000 c. f.	December 1952-----	1, 079, 000 c. f.
May 1952-----	1, 136, 000 c. f.	January 1953-----	1, 463, 000 c. f.
June 1952-----	888, 000 c. f.	February 1953-----	1, 287, 000 c. f.
July 1952-----	1, 007, 000 c. f.	March 1953-----	0 c. f.

³ "§ 221.14. *Suspension of operations and production.* On receipt of an application for suspension of operations or production or for relief from any drilling or producing requirement under a lease, the supervisor shall forward such application, with a report and recommendation, to the appropriate official and, pending action thereon, grant such temporary approval as he may deem warranted in the premises or reject such application * * *."

⁴ See *Wilbur v. United States ex rel. Osage Oil & Refining Co.*, 54 F. 2d 437 (App. D. C. 1931); *Jewett v. Coffeyville Vitrified Brick & Tile Co.*, 122 Kans. 287, 251 Pac. 1110 (1927); *Solicitor's Opn.*, 58 I. D. 12 (1942); *Summers, The Law of Oil & Gas*, perm. ed., sec. 305.

March 11, 1957

of the lease, no further payments are due, neither could the making of such payments reinstate or continue a lease which had expired by virtue of its own terms.⁵

There is no existing authority as a basis upon which the appellants' application for a suspension of operations could have been granted and the term of the lease extended. The appellants refer to the Assistant Secretary of the Interior's decision of March 23, 1955 (*Robert E. Mead and Griffith Moore*),⁶ as reflecting the Secretary's power to grant relief in that respect. However, the action taken there was regarding an oil and gas lease issued under the provision of section 17 of the Mineral Leasing Act, as amended,⁷ which act, of course, applies to public but not to Indian lands, such as those covered by the present lease. Moreover, a provision in the Mineral Leasing Act (sec. 39)⁸ provides specifically for the suspension of operations and the extension of the term of leases issued under that act. The condition in the instant lease that it shall continue only for the primary period of 10 years and as much longer thereafter as oil or gas is produced in paying quantities stems from a statutory limitation in that respect found in the act of May 11, 1938.⁹ In the face of such a congressional direction, and in the absence of authority to waive or alter the condition under which the tribal lease was executed and approved, no officer of this Department was authorized to permit a suspension of operations under the tribal lease and thereby continue in force a lease which expired by reason of its own terms.¹⁰ Such administrative power must derive from congressional authority which is not now apparent.

Accordingly, the decision of the Commissioner of Indian Affairs, dated December 19, 1955, is affirmed, and the appeal of the appellant oil companies is denied.

HATFIELD CHILSON,
Assistant Secretary.

**MAY A HUSBAND AND WIFE, OR EITHER OF THEM, HOLD THE
MAXIMUM PERMISSIBLE ACREAGE IN OIL AND GAS LEASES IN
A STATE AND ALSO HOLD ADDITIONAL ACREAGE AS TRUSTEE
OR TRUSTEES FOR THEIR MINOR CHILDREN**

Oil and Gas Leases: Acreage Limitations

A husband and wife may each hold the maximum acreage permitted by section 27 of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181

⁵ See *United States v. Brown*, 15 F. 2d 565 (N. D. Okla., 1926); cf. *Haby v. Stanolind Oil & Gas Co.*, 228 F. 2d 298, 306 (5th Cir. 1955).

⁶ 62 I. D. 111 (1955).

⁷ 30 U. S. C., 1952 ed., sec. 226.

⁸ 30 U. S. C., 1952 ed., sec. 209.

⁹ 52 Stat. 347; 25 U. S. C., 1952 ed., sec. 396a.

¹⁰ Cf. *United States v. Brown*, *supra*, fn. 5.

et seq.), as amended, to a single lessee. They may hold together, as an association, such maximum acreage. Where either holds the maximum acreage he (or she) may not hold additional acreage as trustee for minor children but where both hold the maximum acreage as an association either may hold in his (or her) own name or as trustee a total combined additional acreage equal to one-half the maximum.

M-36418

MARCH 11, 1957.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

In your memorandum of January 25, 1957, you asked several questions relative to the application of State community property laws to Federal oil and gas leases and concluded with the above question [title] in substance. Since the answer to your other questions appeared to divorce this one from the general subject (see M-36416, Feb. 27, 1957, p. 45) it was deemed advisable to answer it separately.

The question as now phrased is, impliedly at least, answered by the regulation in 43 CFR 192.42 (e) (5) which requires a trustee for a minor oil and gas lessee to furnish evidence not only of the minor's qualifications but of his own as well. This regulation is based on the provisions of sections 1 and 27 of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*) as amended, which (section 1) limits the issuance of such leases to citizens and (section 27) forbids both direct and indirect holding of acreage in excess of the prescribed maximum.

The succinct answer to your question is that neither a husband nor a wife holding the maximum allowable acreage in his (or her) own name may hold additional acreage as a trustee for his (or her) minor children. Where a husband and wife together hold the maximum acreage permitted to a single lessee, either may hold individually or as trustee or in part one and in part the other additional acreage up to one-half of the jointly held maximum.

J. RUEEL ARMSTRONG,

Solicitor.

HENRY OFFE

A-27408

*Decided March 18, 1957***Small Tract Act: Renewal of Lease—Regulations: Applicability**

Where a regulation governing renewal of small tract leases is amended after the issuance of a lease and is not specifically incorporated by reference in the lease, the regulation will be deemed applicable to the lease if it confers a benefit and not an added obligation on the lessee, does not affect the rights of others, and is not detrimental to the interests of the United States.

Small Tract Act: Renewal of Lease

An application for renewal of a small tract lease which has been classified for lease and sale may be approved where a showing is made that the lessee's failure to meet the requirements for sale of the tract is justified under the

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circumstances and that nonrenewal of the lease would work an extreme hardship on the lessee.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Henry Offe has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated July 19, 1956, which affirmed the decision of the manager of the Los Angeles land office, dated April 11, 1955, rejecting his application to renew his small tract lease of the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 16, T. 1 S., R. 4 E., S. B. M., California, issued under the act of June 1, 1938 (43 U. S. C., 1952 ed., sec. 682a), for the reason that Mr. Offe had not placed the required improvements on the land and had not satisfactorily explained his failure to do so.

The appellant's lease was issued for a period of 5 years on April 11, 1950, and provided that the lessee was entitled to purchase the land on or after 1 year from the date of the lease provided that he had made the required improvements on the land and complied with the terms and conditions of the lease. By section 4 (b) of the lease the lessee agreed to construct upon the land "improvements appropriate for the use for which the lease is issued," which was as a cabin site.

On April 6, 1955, 4 days before the lease was due to expire, the appellant filed with the land office, an application to renew his lease. The application stated that the appellant was applying to renew the lease and eventually to amend the lease "in an appropriate direction." It also stated that the appellant had tried to comply with the terms and conditions of the lease and referred to an attached statement and enclosures. In the space on the standard form of application for renewal (Form 4-775a) which called for a description of the improvements constructed on the land, the appellant stated "The applicant is especially calling attention to the lack of accessibility caused probably by erosion." In a letter to the land office, which accompanied the appellant's application for renewal, he stated that renewal of his lease would give him a chance to make the location accessible, and that he had undergone two operations since 1953 but had secured the services of a licensed contractor to erect a building on the tract. With the letter he enclosed an advertisement of a "package plan" 12- by 16-foot house and a letter dated March 29, 1955, from the contractor stating that he had examined the appellant's leased land and had found it to be inaccessible for transporting building material, equipment, etc., because of four deep washes. The contractor recommended that the appellant find some other site.

The manager rejected the application for renewal and his decision was later affirmed by the Director. From the latter decision the applicant has appealed to the Secretary.

In his decision the Director cited a provision of the appellant's

lease to the effect that the lessee could apply for renewal of his lease "not more than 6 months nor less than 60 days prior to the expiration thereof" and stated that the appellant did not apply for renewal of the lease until April 6, 1955. The decision then stated that "Even if he had, however, the application would still be held for rejection for the reasons below." The decision went on to say that under the departmental regulation in effect when the appellant's lease terminated renewals could be granted only upon a showing that the lessee's failure to meet the requirements for sale of the tract (i. e., the construction of improvements) was justified under the circumstances and that non-renewal of the lease would work an extreme hardship on the lessee. The Director concluded that the information given by the appellant with respect to his dealings with the contractor and his illness did not meet the requirements of the regulation.

The Director's decision reveals some confusion as to the requirements necessary for a renewal of the appellant's lease. Section 2 of the lease provided:

The Lessee may apply for renewal of the lease, not more than 6 months nor less than 60 days prior to the expiration thereof, and, if it is determined that a new lease should be granted, will be accorded a preference right to a new lease, for such term and upon such conditions as may be fixed.

This provision was in accordance with the regulation in effect at the time when the lease was issued (43 CFR, 1949 ed., 257.11).

The Department has very recently held in the case of *Gilbert V. Levin*, 64 I. D. 1 (1957), that this provision of the lease gave the lessee a contractual right to a renewal of his lease provided he applied for a renewal within the time limits specified and it were determined that a new lease should be issued. Thus, it was incorrect for the Director to state that even if the appellant had applied in time his application for renewal could not be allowed because of his failure to show a justification for not constructing the required improvements and his failure to show hardship. No such showing was required under section 2 of the appellant's lease.

The appellant, of course, did not apply for a renewal not less than 60 days before the expiration of his lease term. Consequently he lost his contractual right of renewal under his lease. The question then is whether any other provision governs his right to a renewal of his lease. At the time when his lease expired, the pertinent small tract regulation on renewals had been amended and renumbered to read as follows:

Renewal of lease. (a) An application for renewal of a lease must be filed on Form 4-775a in duplicate * * * prior to the expiration of the lease. A renewal in the form of a new lease will be granted only if it is determined that a new lease should issue and that the requirements of paragraph (b) or (c) of this section have been met. * * *

* * * * *

(c) Where the land has been classified for lease and sale, renewals will be approved only upon a satisfactory showing that the lessee's failure to meet the requirements for sale of the tract is justified under the circumstances and that nonrenewal of the lease would work an extreme hardship on the lessee. [43 CFR, 1955 Supp., 257.15.]

The appellant complied with this regulation to the extent that he filed his application in duplicate on the proper form before the expiration of his lease term and submitted a showing as required by the regulation.

The Director, assuming the applicability of this regulation, held the showing to be insufficient. But the question, first, is whether the regulation is applicable. In *Gilbert V. Levin, supra*, there was involved an application for a renewal of a small tract lease issued on the same form as the appellant's lease in this case. In fact, the Levin lease was issued on April 18, 1950, just 7 days after the appellant's lease. Levin, however applied for a renewal prior to 60 days before the end of the lease term. The Bureau of Land Management rejected Levin's application for renewal on the ground that he failed to make the showing required by the regulation just quoted (Sec. 257.15). The Bureau's action was reversed by the Department, it being held that the Levin lease incorporated only the small tract regulations in effect at the time the lease was issued and not subsequent changes in the regulations. And, as stated earlier, the Department held that, if a new lease were to be issued, Levin had a contractual right of renewal under section 2 of the lease since he applied for a renewal within the time limits specified.

It was pointed out in the *Levin* decision that the ruling on incorporation of changes in regulations was confined to changes which would impose an additional obligation or burden upon a lessee. Thus, the Bureau of Land Management, by invoking sec. 257.15, had required Levin to make a showing of hardship and of justification for failure to construct improvements whereas section 2 of his lease and the regulation in effect when his lease was issued required only that he apply for a renewal within certain time limits. The Department held that the Levin lease could not be interpreted as incorporating the later change in the regulation requiring a showing of hardship. The Department specifically pointed out that where a change in regulations would relieve a lessee of obligations or extend him a benefit and would not be detrimental to the interests of the United States, such a benefit might well be extended to a lessee even though his lease did not incorporate future regulations. However, that question was not presented in the *Levin* case and was not decided.

The question is presented here. The appellant cannot avail himself of section 2 of his lease and the old regulation on renewal since he did not apply in the time required. The new regulation permits a renewal application to be filed at any time prior to expiration of the

lease. Thus, if the new regulation is extended to the appellant's lease, it confers a benefit upon him. As no one else has any rights which would be impaired by giving the appellant the benefits of the new regulation and as it does not appear that any interests of the United States would be adversely affected by such action, I conclude that the appellant was entitled to apply for a renewal in accordance with the new regulation. Of course, coming under the new regulation, he was required to make the showing required by that regulation. The Director held he had not. To that question we now turn.

The first point that must be shown is that the appellant's failure to meet the requirements for sale of the tract was justified under the circumstances. The requirement for sale which is at issue here is the necessity for constructing improvements on the land, that is, a cabin.

In regard to this point the appellant contends that he attempted to place a prefabricated house upon the tract but was prevented from doing so by the fact that flood erosion had cut deep gullies into the tract rendering it inaccessible for the purpose of placing the house upon the tract. The appellant stated in his appeal from the manager's decision that he explained to the manager in his conversation with him on March 30, 1955, that:

* * * I did mention, that a year ago we did have in the San Bernadino County heavy floods, which may have caused the inaccessability of the tract, destruction of roads, but that the building activity of neighbors in this location will change the communications conditions in favour of accessability. * * *

The statements of the appellant regarding the inaccessibility of the tract because of gullies caused by erosion are largely corroborated by the letter of the contractor which was attached to his application to renew his lease. This fact, which was beyond the control of the appellant, afforded a justification for failing to construct a cabin on the leased tract at least during part of the last year of the lease.

The appellant asserts also that in 1955, before seeing the contractor, he arranged with a carpenter to build on the tract but the carpenter took another job. The appellant states that he tried again and again to obtain qualified help but was unable to secure any.

In addition, in regard to his failure to construct improvements prior to 1955, the appellant has submitted with his appeal statements from two physicians showing that he underwent two major surgical operations in May and November 1953 from which he recovered slowly and was disabled and unable to work until the spring of 1956. An additional statement is furnished from a dentist showing that he was a dental patient from May 1954 until June 1956.

The fact alone that the appellant was physically unable to work during the last 2 years of his lease would not justify his failure to construct improvements since there is no requirement that he do the work himself. However, it also appears that he is a man of limited means. Considering his physical incapacity, his limited finances

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and medical expenses, his efforts to secure help to construct improvements, and the physical barriers to transporting building materials to the tract, I believe a sufficient showing has been made justifying his failure to construct his improvements.

Indeed, a stronger justification is shown here than in *Joseph L. Kirg*, A-26843 (December 18, 1953). There the lessee left his tract in California to work as a construction superintendent in Pittsburgh, Pennsylvania. This was during the last year of his lease and a 1-year renewal of the lease. During that time he made arrangements with three successive contractors to build on the tract but each was unable to do the work. The Department allowed an extension of the lease for another year in view of the lessee's apparent good faith.

On the question of hardship, according to the statements made by the appellant, he has reached the age at which he wishes to retire; his wife is crippled by arthritis and he hopes that a desert climate will give her relief from her arthritic pains; he is a man of limited financial resources, but feels he could make a living by raising poultry and truck gardening; and loss of the small tract lease would mean extreme hardship to him. A similar showing as to health needs and retirement desires was accepted in the *Kirg* case.

Under all of the circumstances of the case it appears that the appellant's failure to meet the requirements for the sale of the tract is justified and that nonrenewal of the lease would work an extreme hardship on him. But, to comport with the intent of the current regulation (43 CFR, 1955 Supp., 257.15), which is that land classified for lease and sale will be sold and not continued under lease, the appellant's lease will be renewed only to the end of this year. This will afford the appellant ample time to construct the needed improvements on the land and to purchase the land.

Therefore, the decision of the Director of the Bureau of Land Management is reversed, and the case is remanded to the Bureau for renewal of the appellant's lease to December 31, 1957.

HATFIELD CHILSON,
Assistant Secretary.

RUBY E. HUFFMAN, FRANCES TORRES, AND
BEULAH MAE CHOQUETTE

A-27373

Decided March 21, 1957

Administrative Practice—Rules of Practice: Generally

The Director of the Bureau of Land Management may, before an appeal is taken to the Secretary, reconsider a previous decision on his own motion and correct any errors that may have been made in the former decision.

Waters and Water Rights: State Laws

Under California law an owner of private lands has a correlative and not an appropriative right to the use of percolating water underlying his land, and this right is analogous in many respects to the riparian right of the owner of land abutting on a watercourse.

Waters and Water Rights: State Laws

Under California law riparian rights do not attach to public land abutting on a watercourse until title to the land passes into private ownership; until then the occupant of the public land has a right to appropriate water for use on the land.

Waters and Water Rights: State Laws

It is not settled under California law whether an occupant of public land has a correlative right to the use of percolating water underlying the land or only an appropriative right prior to passage of title to the land.

Desert Land Entry: Water Right

Although the California law is not clear as to the rights of desert land entrymen to the use of percolating water underlying the entered land, there is sufficient support for the position that desert land entrymen do have appropriative rights and that such rights satisfy the requirements of the Desert Land Act so that the Department will not reject applications for desert land entry as a matter of law for the reason that the applicants intend to use percolating water for the reclamation of the entries.

Solicitor's Opinion M-36378 (January 19, 1956) overruled to extent inconsistent.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ruby E. Huffman, Frances Torres, and Beulah Mae Choquette, each of whom filed an application to enter land in California under the Desert Land Act (43 U. S. C., 1952 ed., sec. 321 *et seq.*), have appealed to the Secretary of the Interior from a decision by the Acting Director of the Bureau of Land Management dated April 2, 1956, wherein the Acting Director vacated a former Bureau decision dated February 21, 1956. The decision of February 21, 1956, had affirmed the action of the District Range Manager, Bakersfield, California, in canceling in part the grazing lease (Los Angeles 089305) of Sidney Lee Smith in order that the applications of the appellants and others to make desert land entries on the land might be allowed. It held that the land proposed to be eliminated from the Smith lease had been properly classified as suitable for disposition under the Desert Land Act.

The decision of April 2, 1956,¹ which was rendered prior to the expiration of the time granted to Mr. Smith to appeal from the Bureau decision of February 21, 1956, found that the desert land applicants intended to rely for the reclamation of the land applied for on per-

¹ Sidney Lee Smith, Appellant, Mary F. Kershner et al., Appellees, Los Angeles 089305, 087992 *et al.*

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colating water to which the applicants had shown no prior right. The Acting Director held that under California law the right to use percolating water underlying land is not such a right as will support the allowance of a desert land entry. He therefore vacated the former decision canceling Mr. Smith's grazing lease in part and rejected the desert land applications.

Thereafter, the appellants took this appeal. Some time later the State Water Rights Board of the State of California, which administers water rights in the State, requested and was granted an opportunity to file a statement on behalf of the appellants. On November 7, 1956, a legal memorandum was submitted by the Board.

The appellants contend that the Acting Director had no jurisdiction to reverse the decision of February 21, 1956, in the absence of an appeal by Mr. Smith and that the decision of April 2, 1956, is erroneous both as to matters of fact and conclusions of law. The appeal does not specify which facts may have been erroneously determined nor does it specify wherein the decision may be erroneous in its interpretation of the law.

With respect to the first contention, it is sufficient to say that the mere fact that a decision has been rendered on a matter within his jurisdiction by the Director, or one acting in his stead, does not cause the Director to lose jurisdiction of the matter. The Director may, before an appeal is taken to the Secretary, reconsider a previous decision, on his own motion, and correct any errors that may have been made in the former decision. It is only after an appeal has been taken to the Secretary that the matter is withdrawn from the jurisdiction of the Director and he cannot, while the appeal is pending in the Department, exercise any further jurisdiction in the matter. *L. D. Crawford, Halvor F. Holbeck*, 61 I. D. 407 (1954). As no appeal had been taken by Mr. Smith from the decision of February 21, 1956, at the time the Acting Director reconsidered the former decision and found it to be erroneous, it is obvious that the matter was still within the jurisdiction of the Acting Director and that he had the authority to vacate the former decision and reject the applications.

The land applied for by the appellants has been found to be land which will not, without irrigation, produce agricultural crops. The soil and topography of the land are of such a character as to render the land susceptible to cultivation if water is available for irrigation. According to a field report no surface water is available for the irrigation of the land. However, according to the same field report, percolating water underlies the land. As shown by the present record, the appellants intend to use this percolating water, which they hope to obtain through the digging of wells on the land to tap the underground source, for the irrigation of the land.

Although the Bureau at first determined that there was probably

sufficient underground water available to the land to justify its classification as suitable for desert land entry, the Acting Director, upon reconsideration, determined that applications for desert land entries covering land in California could not be allowed where the applicants showed merely that they intended to reclaim the land through the use of percolating water to which they had established no prior right. Reconsideration was prompted by a departmental decision rendered on March 12, 1956, involving the allowance of desert land entries in the State of Arizona (*Oma B. Davidson et al.*, 63 I. D. 79 (1956)).

The Desert Land Act requires every applicant for a desert land entry to file a declaration that he intends to reclaim the land applied for by conducting water upon the same, and, further, "That the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation." A regulation of the Department (43 CFR 232.13) provides that no application will be allowed unless accompanied by evidence satisfactorily showing that the applicant has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

As stated above, all that the present appellants have shown is that they hope to acquire sufficient water for the reclamation of the land from the percolating water which they believe underlies the land applied for.

The Solicitor has recently considered the requirements of the Desert Land Act. He held that the rule of prior appropriation—i. e., that the first appropriator of water for a beneficial use has the prior right to the extent of his actual use and that that right is entitled to protection—was a well established doctrine of water law in the western states in 1877 when the Desert Land Act was passed and that, when Congress provided in the act that the right to the use of water by desert land entrymen "shall depend upon bona fide prior appropriation," Congress used the words "prior appropriation" as words of art having a clear and precise meaning. He held that under the doctrine of prior appropriation a prior appropriator acquires a legal right to a definite quantity of water which cannot be diverted by any subsequent appropriator even though the latter could put the water to beneficial use. He held further that the right to appropriate water for the reclaiming of a desert land entry is a matter governed by State law and that whether a desert land entry can be based upon percolating water depends upon whether under the law of a particular State percolating water is subject to the doctrine of prior appropriation. He found that under Arizona law percolating water is not subject to the doctrine of prior appropriation and that therefore applica-

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tions for desert land entries in Arizona cannot be allowed where the entries would be dependent upon percolating water for reclamation. Solicitor's Opinion M-36263, 62 I. D. 49 (1955). It was the application by the Department of those principles in the *Davidson* case which caused the Acting Director to reconsider the decision of February 21, 1956.

It becomes necessary therefore to examine the law of California to determine whether under that law the rule of prior appropriation is recognized with respect to percolating water and whether an appropriator of such water for use on overlying land acquires a legal right to a definite quantity of water which cannot be diverted by others.

In examining that law, we find that California has in the past applied both the doctrine of riparian rights and the doctrine of appropriation to the waters of the State. Both of these doctrines were from time to time modified by the California courts, which took cognizance of local conditions in settling controversies between rival users of water. Recognizing a need for the clarification of its water law, in 1928 California adopted an amendment to its constitution (art. XIV, sec. 3) which "compresses into a single paragraph a reconciliation and modification of doctrines evolved in litigations that have vexed its judiciary for a century." The amendment is designed "to serve the general welfare of the State by preserving and limiting both riparian and appropriative rights while curbing either from being exercised unreasonably or wastefully. The amendment * * * now constitutes California's basic water law * * *." *United States v. Gerlach Live Stock Co.* 339 U. S. 725, 743, 751 (1950).

The amendment declares:

* * * that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Thus, while California has retained both doctrines, it has limited the amount of water which may be used by either riparian owners or appropriators to that amount of water which may be reasonably required for the beneficial use to be served.

All water flowing in any natural channel except insofar as the water has been or is being applied to useful and beneficial purposes upon or insofar as it may be reasonably needed for useful and beneficial purposes upon land riparian thereto or otherwise appropriated is subject to appropriation under the California law. (Water Code, State of California, secs. 1200-1202.) An appropriation made pursuant to that law has priority of right as of the date of the application to appropriate. (*Id.*, sec. 1450.) However the legislature of the State has provided no statutory method under which percolating water may be appropriated. That is not to say, however, that California does not recognize rights to appropriate and use percolating waters.

The Supreme Court of California has long recognized the right to take percolating water and, while the doctrine of reasonable use was applied at an early date to such taking by overlying landowners, the court recognized that as between one using the water for the benefit of his own overlying land and one diverting the water out of the underground basin for use on distant land, the right of the overlying landowner was paramount. In *Katz et al. v. Walkinshaw*, 74 Pac. 766 (1903), the court said:

* * * In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such landowners—those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case the rights of the first class of landowners are paramount to that of one who takes the water to distant land, but the landowner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. As to those landowners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators. Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. * * *

In *Burr v. Maclay Rancho Water Co.*, 98 Pac. 260 (1908), the court decided one of the questions left undecided in the *Katz* case. It held that an appropriation of percolating water for use on distant land is subject to the reasonable use of the water by the owner of overlying land, even though the overlying landowner has never used the water. However, it also held that if the overlying owner does not use the

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water, the appropriator may take all of the regular supply to distant land until such landowner is prepared to use it and begins to do so. It held the right of an overlying landowner to the use of percolating water to be analogous to that of a riparian landowner to the use of water in a flowing stream.

In *City of San Bernardino v. City of Riverside et al.*, 198 Pac. 784 (1921), the court, after noting that the State had adopted the doctrine that the respective rights of owners of land in percolating waters underlying those lands are reciprocal and correlative, held that while the owner of overlying land who does not use the percolating water underlying his land and whose land is not injured by an exportation of the water to distant land has no right to enjoin such exportation, he may, nevertheless, apply to the court for a judgment declaring his own right and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such manner as to destroy or endanger the source of supply.

After the adoption of the 1928 amendment, the court in *Peabody et al. v. City of Vallejo*, 40 P. 2d 486 (1935), held that the limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. The court reaffirmed the holdings in the *Katz* and *Burr* cases and concluded:

That the rule of reasonable use as enjoined by section 3 of article 14 of the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying landowner, or the percolating water right, or the appropriative right.

In *Tulare Irr. Dist. et al. v. Lindsay-Strathmore Irr. Dist.*, 45 P. 2d 972 (1935), it was held that the new State policy not only protects the actual reasonable beneficial uses of the riparian or overlying landowner but also protects the prospective reasonable use of such owners as well.

The latest pronouncement by the Supreme Court of California on the subject of percolating waters appears to be that of *City of Pasadena v. City of Alhambra et al.*, 207 P. 2d 17 (1949). The city of Pasadena, the chief producer of water from a basin of ground water, instituted the litigation in 1937 to determine the ground water rights within the area and to enjoin an alleged annual overdraft in order to prevent eventual depletion of the supply. The principal issues presented on appeal were whether the trial court properly limited the amount of water that one of the defendants, the sole appellant, could take from the ground in the area and whether it erred in placing the burden of curtailing the overdraft proportionately on all parties. In affirming the trial court the court said:

Although the law at one time was otherwise, it is now clear that an overlying owner or any other person having a legal right to surface or ground water may

take only such amount as he reasonably needs for beneficial purposes. * * * Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for non-overlying uses, such as devotion to a public use or exportation beyond the basin or watershed. * * *

* * * Proper overlying use, however, is paramount, and the right of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the taking of non-surplus waters. As between overlying owners, the rights, like those of riparians, are correlative and are referred to as belonging to all in common; each may use only his reasonable share when water is insufficient to meet the needs of all. * * * As between appropriators, however, the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount that he has taken in the past, before a subsequent appropriator may take any. * * *

Prescriptive rights are not acquired by the taking of surplus or excess water, since no injunction may issue against the taking and the appropriator may take the surplus without giving compensation; however, both overlying owners and appropriators are entitled to the protection of the courts against any substantial infringement of their rights in water which they reasonably and beneficially need. * * * Accordingly, an appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right. * * *

In the present case some of the parties * * * have pumped water solely for use on their own land, and their rights at the outset were overlying. The principal takers of water, however, are public utility corporations and municipalities which have either exported water or have used it within the Western Unit for municipal purposes or for sale to the public, and their taking, when commenced, was entirely appropriative. * * *

It follows from the foregoing that, if no prescriptive rights had been acquired, the rights of the overlying owners would be paramount, and the rights of the appropriators would depend on priority of acquisition under the rule that the first appropriator in time is the first in right. * * * If such were the case, the overdraft could be eliminated simply by enjoining a part of the latest appropriations, since the record shows that there is ample water to satisfy the needs of all the overlying users and most of the appropriators * * *. [Pp. 28-29.]

The court then found that there had been an actual adverse user of water in the area; that there had been a mutual invasion of the rights of both overlying owners and appropriators commencing in the year 1913, when the overdraft first occurred; that each taking of water in excess of the safe yield was wrongful; that the proper time to act to preserve the supply is when the overdraft commences; and that the evidence was sufficient to charge appellant with notice that there was a deficiency rather than a surplus and that the takings causing the overdraft were invasions of the rights of overlying owners and prior appropriators.

The court then said:

Neither the overlying owners nor the appropriators took steps to obtain the aid of the courts to protect their rights until the present action was instituted,

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many years after the commencement of the overdraft, and at first glance it would seem to follow that the parties who wrongfully appropriated water for a period of five years would acquire prior prescriptive rights to the full amount so taken. The running of the statute, however, can effectively be interrupted by self help on the part of the lawful owner of the property right involved. Unlike the situation with respect to a surface stream where a wrongful taking by an appropriator has the immediate effect of preventing the riparian owner from receiving water in the amount taken by the wrongdoer, the owners of water rights in the present case were not immediately prevented from taking water, and they in fact continued to pump whatever they needed. * * * The owners were injured only with respect to their rights to continue to pump at some future date. The invasion was thus only a partial one, since it did not completely oust the original owners of water rights, and for the entire period both the original owners and the wrongdoers continued to pump all the water they needed.

The pumping by each group, however, actually interfered with the other group in that it produced an overdraft which would operate to make it impossible for all to continue at the same rate in the future. If the original owners of water rights had been ousted completely or had failed to pump for a five-year period, then there would have been no interference whatsoever on the part of the owners with the use by the wrongdoers, and the wrongdoers would have perfected prior prescriptive rights to the full amount which they pumped. As we have seen, however, such was not the case, and although the pumping of each party to this action continued without interruption, it necessarily interfered with the future possibility of pumping by each of the other parties by lowering the water level. The original owners by their own acts, although not by judicial assistance, thus retained or acquired a right to continue to take some water in the future. The wrongdoers also acquired prescriptive rights to continue to take water, but their rights were limited to the extent that the original owners retained or acquired rights by their pumping.

* * * * *

We hold, therefore, that prescriptive rights were established by appropriations made in the Western Unit subsequent to the commencement of the overdraft, that such rights were acquired against both overlying owners and prior appropriators, that the overlying owners and prior appropriators also obtained, or preserved, rights by reason of the water which they pumped, and that the trial court properly concluded that the production of water in the unit should be limited by a proportionate reduction in the amount which each party had taken throughout the statutory period. [Pp. 31-33.]

In brief, the principles set forth by the California courts in the cases just discussed, which did not involve public lands, are as follows: Percolating water is, first, subject to the needs, both present and prospective, of overlying landowners whose rights therein are correlative and proportionate. The right of an overlying landowner is not to a definite quantity of water but only to a proportionate share, with other overlying landowners, of such percolating water as he can put to a reasonable beneficial use on the overlying land. Only that portion of percolating water surplus to the needs of overlying landowners in a basin may legally be appropriated and then only for nonoverlying uses. While an appropriator of surplus water may use the water as long as it is not being used by the overlying landowners, he acquires no right to the continued use of the surplus except as against subsequent appro-

priators. His use of the water must yield to the needs of the overlying landowners in the event of a shortage.

On the premise that a desert land entryman has only the correlative right of an overlying landowner to percolating water, the Acting Director held that such a right would not meet the requirements of the Desert Land Act. If this premise is sound, the conclusion would be inescapable. There is no sound basis for holding that a correlative or overlying right is equivalent to an appropriative right.

The State Water Rights Board questions the premise. It asserts that *Pasadena v. Alhambra* was not concerned with public lands or desert land entries and that the principles enunciated in the decision are inapplicable to public lands. The Board declares that there is no other California case on the question and that therefore it is necessary to look to analogous cases to ascertain what rules the California courts would apply to desert land entries on public land.

The argument of the Board appears to run as follows: The California courts have often said that the overlying right is analogous to the riparian right of one owning land abutting on a watercourse. Both rights exist solely by reason of the situation of land with respect to a supply of water. Title to riparian and overlying rights is acquired in the same way—by acquiring title to the land. Neither right is based upon use of water and neither is lost (in the absence of prescription) by disuse. Ordinarily, neither right is measured by a specific quantity of water.

With respect to riparian rights, the California courts have held that riparian rights do not attach to public lands until ownership of the land has passed from the United States. *McKinley Bros. v. McCauley*, 9 P. 2d 298 (1932); *San Joaquin & Kings River Canal & Irr. Co. v. Worswick*, 203 Pac. 999 (1922); *Rindge v. Craggs Land Co.*, 205 Pac. 36 (1922). When title to riparian public land passes, riparian rights attach to the land not as of the date of patent but as of the date of entry or even settlement upon the land. *Haight v. Costanich*, 194 Pac. 26 (1920); *Pabst v. Finmand*, 211 Pac. 11 (1922). Nonetheless, despite the relation back of riparian rights once title has passed, until there has been a transfer of title, the occupant of the public land cannot claim a riparian right. During that period, however, he can appropriate water and has the right to the use of water to the extent of his appropriation for a reasonable beneficial use.²

As to the relationship of his appropriative rights to riparian rights in the same watercourse, the California courts have held that appropriative rights on public lands are superior to the riparian rights of those acquiring abutting public lands at a later date, whether upstream or

² The appropriative right is not lost upon the passage of title. It can still be asserted by the patentee although he has now acquired riparian rights. In other words, a riparian landowner can have both appropriative and riparian rights. *Rindge v. Craggs Land Co.*, *supra*.

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downstream from the point of appropriation. *Rindge v. Crags Land Co.*, *supra*; *San Joaquin & Kings River Canal & Irr. Co. v. Worswick*, *supra*; *Utt v. Frey*, 39 Pac. 807 (1895); *Barrows v. Fox*, 32 Pac. 811 (1893). While perhaps most of the California cases on this point concern situations where one went on public land abutting a stream and took water for use on nonriparian land, whether public or privately owned, the court has applied the same rule in at least one case where the appropriation was made by an occupant of riparian public land for use on that land. *McKinley Bros. v. McCauley*, *supra*; see also *McGuire v. Brown*, 39 Pac. 1060 (1895). Where riparian rights on a watercourse have been established before the appropriation is made on public land abutting the watercourse, the appropriation is subordinate to the previously established riparian rights. *Hargrave v. Cook*, 41 Pac. 18 (1895).

The California courts have applied a different rule in the case of appropriations made on private lands. The courts have held that where an appropriation is made on private lands, the appropriative right is inferior to the riparian rights of one who later acquires riparian public land upstream. *Cave v. Tyler*, 65 Pac. 1089 (1901); *Cory v. Smith*, 274 Pac. 969 (1929); *San Joaquin & Kings River Canal & Irr. Co. v. Worswick*, *supra*.³

Applying these principles to overlying rights to percolating waters, the State Water Rights Board apparently contends that the correlative right of an overlying landowner to percolating water underlying the land does not attach to public land until title to the land has passed out of Government ownership and that, until title passes, a desert land entryman on the land has a right to appropriate the percolating water for use on his entry. Therefore, the Board concludes, the right of a desert land entryman to the use of percolating water for the reclamation of his entry is dependent upon bona fide prior appropriation and thus meets the requirements of the Desert Land Act. The Board would presumably agree that upon the patenting of a desert land entry, the correlative right of an overlying landowner would attach to the patented land as of the date on which the entry was made. However, as in the case of an entryman on riparian public land, the only right an entryman on overlying public land would have prior to patent would be a right of appropriation.

The Board's position that a desert land entryman has a right to appropriate underlying percolating water for the reclamation of his entry has support in the California court cases which have been cited. The question then is whether this right of appropriation satisfies the requirement of the Desert Land Act that "the right to the use of water * * * shall depend upon bona fide prior appropriation."

³ The principles just discussed are set forth in Hutchins, *The California Law of Water Rights* (1956), pp. 56-62.

In a ground water basin where all the land is public land, the answer would seem obvious. If desert land entries were allowed in such a basin, the only rights to the use of percolating waters that the entrymen would have would be rights dependent upon appropriation, and among themselves their relative rights would depend upon priority of use. Thus, until the entries went to patent, the only doctrine of water rights that would exist in the basin would be the doctrine of bona fide prior appropriation. Even after the entries went to patent, which would result in the patentees becoming vested with the correlative rights of overlying landowners, such rights would be subordinate to already established appropriative rights. It would seem clear then that the appropriative rights of entrymen in this type of situation would meet the requirements of the Desert Land Act.

However, the situation would be different in a ground water basin where a substantial amount of land is in private ownership at the time when a desert land entry is allowed on public land in the basin. The entryman's right to the use of percolating water would still be a right based upon appropriation but it would be subordinate to the correlative rights of the private landowners. The entryman would have only the right to appropriate water surplus to the needs of the landowners. He would be in the same position as the appropriators of water for distant land in *Pasadena v. Alhambra*. In other words, he would have a second ranking type of water right, correlative rights occupying the top rank.

This presents the question whether a second ranking class of water rights, although based on appropriation, satisfies the Desert Land Act. The language of the act is that the entryman's right "shall depend upon bona fide prior appropriation." Literally read, this language seems to require no more than that an entryman have an appropriative water right, regardless of whether appropriative rights are superior or subordinate to other classes of water rights, such as riparian or correlative rights. Some doubt, however, is cast upon this interpretation by statements of the United States Supreme Court in the case of *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935). In that case the Court had before it the question whether a homestead patent issued in 1885 for land abutting on a stream carried with it the common law riparian right. The Court held that it did not, declaring that the Desert Land Act severed water from the soil and that the patent simply conveyed title to the land. In reaching this result the Court delved into the background of the Desert Land Act, making the following statements which have a relevance to the question at hand:

For many years prior to the passage of the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, 253, the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uni-

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formly recognized as having the better right to the extent of his actual use. *The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree.* * * * The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection * * * . [P. 154.]

* * * That body [the Congress] thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a *complete adherence* to the rule of appropriation for a beneficial use as the *exclusive criterion* of the right to the use of water. * * * [P. 157.] Necessarily, that involved the *complete subordination* of the common-law doctrine of riparian rights to that of appropriation. * * * [P. 158.]

In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. * * * [P. 158; italics added.]

These statements suggest that Congress intended that the Desert Land Act should be applicable in States where the doctrine of prior appropriation was the exclusive or predominant doctrine of water rights and that entrymen must have a top ranking class of water right, not one that is subordinate to riparian or similar rights. On the other hand it is possible to construe the Court's statements as saying only that with respect to public lands the doctrine of prior appropriation must attach, regardless of the relation of that doctrine to the doctrine of water rights appertaining to privately owned lands. In this view it would be sufficient that one entering on desert public land has a water right based upon appropriation regardless of whether that right rates below the riparian or correlative right of his neighbors on privately owned lands.

To sum up at this point, we are confronted with two questions as to which the courts have not spoken: (1) whether under California law a desert land entryman, prior to patent, has an appropriative or only a correlative right to the use of percolating water for the reclamation of his entry, and (2), if he has an appropriative right, whether it is such an appropriative right as is intended by the Desert Land Act. Although the answers to these questions are far from clear, it is my opinion that there is sufficient support for the position that desert land entrymen do have appropriative rights and that such rights satisfy the requirements of the act so that the Department would not be warranted in holding that desert land applications must be rejected as a matter of law because the applicants intend to rely upon percolating water for reclamation. This does not mean, of course, that applications cannot be rejected in the exercise of the Secretary's authority under section 7 of the Taylor Grazing Act, as

amended (43 U. S. C., 1952 ed., sec. 315f), to classify land as suitable or not suitable for desert land entry if he determines that there is an insufficient supply of percolating water to enable the reclamation of the entries, taking into consideration the rights and needs of other lands for such percolating water.

The Director's decision of February 21, 1956, had sustained the classification of the land in the appellants' applications as being suitable for desert land entry. This decision was vacated on April 2, 1956, solely on the ground that under California law the right to use percolating water to reclaim a desert land entry is not a right based upon prior appropriation. In view of the conclusion reached in the instant proceeding, it is apparent that the decision of April 2, 1956, must be reversed as to the three appellants, which will leave the decision of February 21, 1956, operative as to them.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Acting Director's decision of April 2, 1956, is reversed as to the three appellants and the case is remanded for further action on their applications pursuant to the decision of February 21, 1956.⁵

J. RUEEL ARMSTRONG,
Solicitor.

UTILIZATION OF LANDS IN THE NAVAJO INDIAN RESERVATION FOR GLEN CANYON DAM AND RESERVOIR

Indian Lands: Rights-of-Way—Rights-of-Way: Generally

The act of February 5, 1948 (62 Stat. 17; 25 U. S. C. sec. 323), providing for "rights-of-way for all purposes" over and across Indian lands applies to sites for all features and facilities, including dams, reservoirs, powerplants, and construction and operating camps, appropriate to water control projects undertaken by the United States.

Solicitor's Opinion M-35093 (March 28, 1949) overruled in part.

M-36395

MARCH 22, 1957.

TO THE SECRETARY OF THE INTERIOR.

I have been requested by both the Bureaus of Indian Affairs and Reclamation to advise whether, for use in connection with the Glen Canyon Unit of the Colorado River Storage Project, the Secretary of the Interior has the authority administratively to make available lands in the Navajo Indian Reservation for use in connection with the construction, operation and maintenance of Glen Canyon Dam,

⁵ Solicitor's Opinion M-36378 (January 19, 1956) discussed briefly the laws of California, Colorado, Montana, and Oregon with respect to the allowance of desert land entries dependent upon percolating water for reclamation. To the extent that that opinion is inconsistent with this decision, the opinion is overruled.

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powerplant and reservoir. This would embrace use of the land for dam and reservoir site, construction and operating camp site and associated uses such as borrow pits and other incidental requirements. The Colorado River Storage Project, of which the Glen Canyon Unit is a principal feature, is authorized by the act of April 11, 1956 (70 Stat. 105).

The Colorado River Storage Project is a Federal reclamation project and by the express terms of section 4 of the act of April 11, 1956, the Secretary, except as otherwise provided in that act, in constructing, operating and maintaining the units of the Colorado River Storage Project, is to be governed by the Federal reclamation laws (act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto). The Glen Canyon Unit is one of the units specifically authorized by section 1 of the act of April 11, 1956, to be constructed, operated and maintained as an initial unit of the storage project.

Section 1 of the act of February 5, 1948 (62 Stat. 17-18; 25 U. S. C. secs. 323-328), empowers the Secretary of the Interior to grant "rights-of-way for all purposes" across Indian lands. Section 5 of the act makes it in terms applicable to rights-of-way for the use of the United States. The availability of this act turns upon the meaning to be accorded the phrase "rights-of-way for all purposes."

Whatever may be its meaning at common law or in nongovernmental usage, the use of the term "right-of-way" to characterize lands to be occupied as the site of works comprising water control projects is neither novel nor unusual in legislative enactments dealing with authorizations to permit the use of lands under the control of the United States, including Indian lands.

Rev. Stat. 2339 enacted in 1866 recognized "right-of-way" over the public lands for "ditches and canals." Rev. Stat. 2340 enacted in 1870 referred to rights to "ditches and *reservoirs*" as may have been recognized by Rev. Stat. 2339. The two sections are codified together as 43 U. S. C. sec. 661. As it is perhaps unnecessary to add, they constitute the foundation stone of the systems of water law of the Western States. The Supreme Court has held that together these sections granted "right-of-way" over the public lands for "ditches, canals and *reservoirs*." [Italics supplied.] *Utah Power and Light Co. v. United States*, 243 U. S. 389, 405 (1917).

Section 18 of the act of March 3, 1891, as amended (43 U. S. C. sec. 946), dealing with rights-of-way through the public lands and reservations of the United States, including Indian reservations, for purposes of irrigation or drainage refers to "rights-of-way" for, among other purposes, reservoirs.

The term "right-of-way" is used in the act of January 21, 1895, as amended (43 U. S. C. sec 956), to characterize land to be occupied by

reservoirs although this act is specifically made inapplicable to Indian reservations. The act authorizes rights-of-way in connection with mining, quarrying, and timbering and for the purpose of furnishing water for domestic, public and other beneficial uses.

A principal source of departmental authority in connection with the grant of rights-of-way through public lands and reservations, including Indian reservations, is the act of February 15, 1901, as amended (43 U. S. C. sec. 959). This act authorizes and empowers the Secretary of the Interior to grant rights-of-way for a wide variety of facilities, including, among others, "dams and reservoirs."

These statutes enumerate various purposes for which, under the conditions therein specified, "rights-of-way" may be granted by the Secretary of the Interior, or is granted upon the filing of requisite documents with the Secretary. Their significance for our purpose lies in the congressional recognition they evidence that "right-of-way" is an appropriate term of reference to describe land to be occupied by such features of water control development as dams and reservoirs. That they are not all applicable to Indian reservations is, in this connection quite immaterial.

Viewing the phrase "rights-of-way for all purposes" in the act of February 5, 1948, in the context of the foregoing enactments, I have no hesitancy in concluding from the text of the statute itself that by the term the Congress intended to embrace at the very least those purposes it had included in statutes which specifically enumerated purposes for which rights-of-way might be granted. I am fortified in this conclusion by the construction the Supreme Court has placed upon the term "right-of-way" when used in a statute which failed to enumerate the kinds of works for which a right-of-way might be granted. The act of May 14, 1896 (29 Stat. 120), authorized and empowered the Secretary of the Interior "to permit the use of right of way * * * upon the public lands and forest reservations of the United States * * * for the purposes of generating, manufacturing, or distributing electric power." Of this statute the Supreme Court has stated, "That it contained no express mention of ditches, canals, and reservoirs, is of no significance, for it was similarly silent respecting power houses, transmission lines and subsidiary structures. *What was done was to provide for all in a general way without naming any of them.*" [Italics supplied.] *Utah Power & Light Co. v. United States*, *supra*, at page 406. If a statute referring to right-of-way for power purposes embraces use of land for all works appropriate to power purposes, *a fortiori*, a statute authorizing rights-of-way "for all purposes" must embrace all land needed for constructing, operating and maintaining a water control project.

Any doubt that the act of February 5, 1948, should be construed broadly to embrace all facilities in connection with water control

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projects is removed by reference to its legislative history. The legislation that resulted in the act was proposed by this Department as a substitute for a measure that had been introduced dealing with rights-of-way for certain purposes through lands of certain classes of members of the Osage Tribe of Indians. The then Under Secretary of the Department, in identical letters to the Speaker of the House and the President *pro tempore* of the Senate dated July 22, 1947, proposed the general form of legislation in order to avoid, when considering applications for rights-of-way over Indian lands, the examination of a plethora of statutes to determine which, if any, covered the particular purpose for which a right-of-way was being sought or the particular category of lands which the right-of-way would affect. The Department also adverted to difficulties encountered in obtaining signatures of individual Indian allottees to easement deeds which were required to be executed by the Indian owners and approved by the Secretary of the Interior in cases when a right-of-way affected allotted lands and could not be granted under the then existing statutory authorities. The general legislation was proposed as a means of overcoming these difficulties by prescribing a general blanket authority which could be utilized in all cases. The following quotations from the Department's identical letters of July 22, 1947, are illustrative of the objectives and purposes sought to be achieved by the act:

For the reasons hereinafter stated, I strongly urge enactment of the proposed legislation.

It will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.

For example, the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), which authorize the granting of transmission line rights-of-way, are limited in their application to "reservations of the United States," which have been held to include only those individual Indian allotments within the original boundaries of Indian reservations which were not extinguished by cession to the United States. These acts are also inapplicable to individual Indian allotments on the public domain. There would seem to be no persuasive reason for maintaining such artificial distinctions.

* * * * *

The proposed legislation would vest in the Secretary of the Interior authority to grant rights-of-way of any nature over the Indian lands described in the bill. The bill preserves the powers of those Indian tribes organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984); the act of May 1, 1936 (49 Stat. 1250), extending certain provisions of that act to Alaska; and the Oklahoma Welfare Act of June 26, 1936 (49 Stat. 1967), with reference to the disposition of tribal land. * * *

In order to avoid any possible confusion which may arise, particularly in

the period of transition from the old system to the new, provision has also been made in section 4 of the bill to preserve the existing statutory authority relating to right-of-way over Indian lands.

It will be obvious from the above that it was the intentment of the 1948 act to draw together all of the authorities theretofore existing; not to restrict purposes theretofore recognized but to embrace them all and to clarify by eliminating inconsistencies and artificial distinctions and limitations. And there can be no doubt, because of the express provisions of section 5, that it was intended to make the United States itself expressly eligible for grants of rights-of-way for any and all purposes theretofore embodied by specific right-of-way acts applicable to Indian lands. Now to read the term "right-of-way" as being inapplicable to such purposes as dams, reservoirs, construction and operating camps and appurtenances required in connection with Federal water control projects would be neither to simplify nor to unify the administration of Indian law. Rather than permitting simplification and uniformity it would continue the general confusion and complexity concerning which the Department had complained.

In recommending passage of the legislation, the Senate Committee on Public Lands referred to the Department's letter in explanation of the purposes of the proposed legislation, and the Committee stated that, "It is the judgment of your Committee that there is a real need for additional legislation relating to rights-of-way on Indian lands of all reservations." (S. Rept. No. 823, 80th Cong., 2d sess., p. 2.) There is no House report on the broader form of that legislation since the House had adopted the original version of the legislation dealing only with Osage lands prior to the receipt of the Department's recommendations for broadening the scope of the bill. Following adoption of the broader form of legislation by the Senate, the House concurred in the Senate version and the measure thus became law. No comment was made concerning the legislation on the floor of either House of Congress. See 94 Cong. Rec. 500, January 26, 1948; *ibid.*, 588, January 27, 1948.

But notwithstanding the foregoing, it might be argued that the meaning of the term right-of-way as used in the act of February 5, 1948, is clear and that there is therefore no occasion to resort to extrinsic legislative aids to determine its meaning.

There are two answers. In the first place the term right-of-way as used in statutes dealing with authority to occupy publicly owned lands is not necessarily limited to a right of passage or to the land occupied therefor. A by no means exhaustive search of the statutes of the 17 Western States reveals express references in the statutes of 10 of these states to "rights-of-way" for, among other purposes, reservoirs.¹ Con-

¹ Colo. Rev. Stats., 1953, chap. 112-3-37; Idaho Code, Sec. 58-601; Sec. 81-804, Repl. vol. 5, Rev. Code Mont., 1947; Sec. 8047, Nev. Compiled Laws, Suppl. 1931-1941; sec. 75-23-20 New Mexico Stats., 1953; Sec. 61-0119, N. Dak. Rev. Code 1943; Title 82, Sec.

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sequently it cannot be said that even on its face the phrase, coupled with the phrase "for all purposes," is so limited in meaning as to preclude examination of earlier statutes and legislative history to determine the intent of the Congress.

Secondly, no so-called rule or canon of statutory construction is subject to greater caution in application than the oft-heard statement that where the literal meaning of words in a statute is clear, resort to extrinsic aids to assist in interpretation will not be made. The cases in which the courts have refused to apply this precept are legion. As Judge Learned Hand has so aptly stated, "There is no surer way to misread any document than to read it literally * * *." *Guiseppi v. Walling*, 144 F. 2d 608, 624 (1944) (concurring opinion).

The principle is not looked upon with favor by the Supreme Court. In *Employees v. Westinghouse Corp.*, 348 U. S. 437 (1955) Mr. Justice Frankfurter, announcing the judgment of the Court in an opinion in which Mr. Justice Burton and Mr. Justice Minton concurred, stated (at page 444) :

* * * And considering that the construction we have found seems plain, the so-called "plain meaning rule," on which construction is from time to time rested also in this Court, likewise makes further inquiry needless and indeed improper. But that rule has not dominated our decisions. The contrary doctrine has prevailed. See *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48; *United States v. Dickerson*, 310 U. S. 554, 561. And so we proceed to an examination of the legislative history to see whether that raises such doubts that the search for meaning should not be limited to the statute itself.

In *Longshoremen v. Juneau Spruce Corp.*, 342 U. S. 237, 243 (1952), the Court reminds that, "literalness is no sure touchstone of legislative purpose."

In *Farmers Irrigation Co. v. McComb*, 337 U. S. 755 (1949), the Court states (p. 764), "But we do not 'make a fortress out of the dictionary.' And we have, therefore, consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts."

The view of the Supreme Court on the frailties of the "literal meaning" rule is cogently set forth in *United States v. Dickerson*, 310 U. S. 554 (1940). There the Court states (at pages 561, 562) :

The respondent contends that the words of § 402 are plain and unambiguous and that other aids to construction may not be utilized. * * * The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found

2, Okla. Stats., Anno.; Sec. 541.240 Ore. Rev. Stats., 1953; Sec. 61.0147 S. Dak. Code 1939; Sec. 73-7-11 Utah Code Anno. 1953. Most of these statutes confer a "right-of-way" over lands of the State for such purposes among others as reservoirs and dams.

by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co. v. United States*, *supra*, [278 U. S. 41], at 48. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction. * * *

Perhaps the clearest statement that the so-called "literal meaning" rule is not inflexible is to be found in the oft-cited opinion of Mr. Justice Holmes, speaking for the Court in *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41 (1928):

* * * It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. * * * [278 U. S. 41 at page 48.]

The foregoing, particularly the last two quotations, effectively dispose of any contention that consideration of earlier statutes and of the legislative history of the act itself is inappropriate in construing the act of February 5, 1948.

I am mindful that one of my predecessors has expressed the opinion that the act of February 5, 1948, is inapplicable to reservoir sites. Opinion M-35093, March 28, 1949 (unpublished). The subject received only the most casual discussion in that opinion, however, and it is quite apparent from the text thereof that consideration had not been given either to the statutory pattern antecedent to the act of February 5, 1948, or to the objectives sought to be achieved by that act. In any event, my views being as above indicated, the conclusion reached in Opinion M-35093 as to reservoir sites is overruled.

In view of the foregoing, I conclude that pursuant to the act of February 5, 1948, the necessary lands of the Navajo Reservation may be made available for use in connection with the construction, operation and maintenance of Glen Canyon Dam and Reservoir and associated facilities to whatever extent and subject to whatever conditions the Secretary of the Interior may determine. This being my conclusion, it is unnecessary to consider whether the required lands may be made available to the United States under the act of February 15, 1901, *supra*, or section 13 of the act of June 25, 1910 (43 U. S. C. sec. 148).

EDMUND T. FRITZ,
Deputy Solicitor.

THE TEXAS COMPANY

A-27427

Decided April 1, 1957

Oil and Gas Leases: Generally

Under the terms of an oil and gas lease issued pursuant to the provisions of the Mineral Leasing Act, as amended, and under the regulations of the

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Department which are a part of such a lease, there is a duty on the part of the lessee to market the gas from an oil well and this obligation is not discharged until the gas is in such a condition that it can enter the market for oil well gas in the field in which the oil well is located.

Oil and Gas Leases: Royalties

In making settlement for the gas royalty due to the United States under an oil and gas lease, a lessee may not deduct from its royalty payment the cost incurred by the lessee in transporting oil well gas to the point of delivery specified in a contract for the sale of the gas when that point of delivery is in the field where the lessee's well is located nor may the lessee deduct the cost of compressing the gas so that it may enter the buyer's line at the working pressure specified under the contract of sale.

APPEAL FROM THE GEOLOGICAL SURVEY

On December 22, 1955, The Texas Company, lessee under oil and gas lease GLO 09287, in the Duck Lake Field, Louisiana, submitted a statement in explanation of its November 1955, settlement for gas royalty due to the United States under its lease, issued pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226). The lessee stated that certain "handling charges" made by Humble Oil and Refining Company for gathering and compressing gas from two oil wells on the lease had been deducted from the sale price of the gas in computing the royalty due. On January 9, 1956, the Oil and Gas Supervisor for the Gulf Coast Region, Geological Survey, disallowed the deductions. The lessee appealed to the Director of the Geological Survey.

In justification of the deductions, the lessee stated that the gas is sold to the United Gas Pipe Line Company under a contract which calls for the delivery of the gas at one of two central points in the Duck Lake Field at a pressure of one thousand pounds per square inch gauge; that it operates only two oil wells in the field; that the Humble Oil and Refining Company operates three oil well gas gathering systems in the field—an eleven hundred pound system for gas requiring no compression, a four hundred pound system for gas requiring one stage of compression, and a two hundred twenty-five pound system for gas requiring two stages of compression; that the four hundred pound and the two hundred twenty-five pound gathering systems are connected to the Humble-owned compressor station situated at the larger of the two delivery points specified in the sales contract with United; that it would have been impractical for the lessee to have installed facilities to gather and compress the small amount of gas coming from its two oil wells and that therefore it arranged with Humble for the use of Humble's facilities to transport the gas to the delivery point specified in the contract and to compress the gas from the low pressure at which it comes from the wells to the one thousand pound pressure required by the buyer in order that the gas may enter the buyer's line at the working pressure maintained in that line. The

lessee admitted that the charge made for compressing the gas is in the nature of a charge for boosting and that the gas could not be marketed at the pressure at which it comes from the two oil wells.

The lessee contended before the Director that the lease does not contain any provision prescribing the manner in which the gas is to be marketed. The lessee admitted its duty to market the gas but contended that this duty arises through the covenant implied by law with respect to oil and gas leases generally that the lessee shall market the production. It contended that under its lease its duty to market extended no further than to market the gas at the wells and that since there was no market at the wells for the low pressure gas it is entitled to deduct from its royalty payment to the United States the cost of transporting the gas to the nearest available market and placing the gas in such condition that it can enter that market.

The Director, in his decision of August 30, 1956, held that, contrary to the assertions of the lessee, the obligations of the lessee did not end at the well head; that there is, under this lease and the applicable departmental regulations which are a part thereof, an obligation on the part of the lessee to put the gas into marketable condition; that the gas is not in a marketable condition until the pressure is such that the gas can be marketed; and that it must be assumed that the point of delivery and the pressure at which the gas is to be delivered is a firm and inflexible requirement imposed on the seller if the gas is to be sold. The Director noted that the delivery of gas to such a point appears to be a normal operating practice throughout the industry and stated that the fact that The Texas Company, for reasons of its own, elected to use the available facilities of Humble for this delivery and compression does not warrant the deduction of the charges made for these services by Humble. The Director held that these operations are a part of the obligations of the lessee under its lease and that it was proper to disallow the deductions.

In its appeal to the Secretary of the Interior, The Texas Company states that the subject of this controversy, the oil well gas, is produced with the oil from the two wells. It admits that the gas when it comes from the wells is in an unmarketable condition but contends that when the gas is separated from the oil, which it admits is a part of the lease operation, the gas is in a marketable condition and that it needs no further treatment to be marketed. However, the appellant also states that the gas cannot be marketed until the pressure of the gas has been stepped up so that it can enter the market. It argues that the compression necessary to accomplish this cannot be called a process to change the condition of the gas to put it in a marketable condition because, it says, it is already in that condition when it leaves the separator. Appellant states that the facilities for the use of which the deductions were made are marketing facilities and, being such, the charge for the use of such facilities should have been allowed.

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The arguments of the appellant are not impressive. They appear to be inconsistent. The appellant seems to be arguing, first, that the gas is in a condition to market when it comes from the separator and, second, that it is not in such a condition until after it has been raised to the pressure which will permit it to enter the buyer's line.

However, it would seem to be immaterial, for the purposes of this decision and under the provisions of the lease here involved, at which point the gas is determined to be in a marketable condition—when it leaves the separator or when the gas is under sufficient pressure to enter the market. The lease requires the lessee to market the production from the lease and until the gas from the wells is in such a condition that it can be sold in the market, it cannot be said that the lessee has fulfilled his obligations under the lease. The lessee has not shown that the gas can be marketed at the pressure with which it comes from the wells.

The appellant's duty to market the gas is not a covenant read into the lease by implication as was the situation in many of the cases cited by the appellant. Here the duty is expressly imposed under the terms of the lease. Section 2 (m) of the lease makes the regulations of the Secretary of the Interior a part of the lease. One of those regulations (30 CFR 221.35) obligates the lessee to prevent the waste of oil or gas. To avoid the physical waste of gas, the lessee is required to consume it beneficially, *to market it*, or to return it to the productive formation. Another regulation (30 CFR 221.47) provides that the value of production, for the purposes of computing royalty, shall under no circumstances be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof. Still another regulation (30 CFR 221.51 (b)) sets forth the policy of the Department not to allow for the cost of boosting residue gas after the extraction of liquid hydrocarbon substances and not to allow other expenses incidental to marketing. While we are not confronted here with an allowance for the cost of boosting residue gas after the extraction of other substances, the appellant has advanced no sound reason why it should be relieved of this cost of marketing its oil well gas when a lessee whose production goes to an extraction plant is required to bear the cost of boosting and other expenses incidental to the marketing of that residue.

In fulfillment of its express duty to market its gas, the appellant made a contract for the sale thereof. It agreed to deliver the gas at a given pressure presumably in order to sell the gas. It cannot reasonably expect the lessor to assume the cost of meeting the lessee's obligation in this respect.

The situation presented here is not comparable to the situations dealt with in the textbooks and cases cited by the appellant wherein the cost of transportation was said to be allowable. In those cases

there was no market in the field for the product and the lessee had to transport the product elsewhere in order to market it. Here a market for oil well gas exists in the Duck Lake Field and the cost of gathering the gas from the wells and transporting it to the point of sale in the field is deemed to be one of the ordinary incidents of lease operation.

Nor is the situation with which we are here confronted comparable to those situations in which the courts have allowed lessees to deduct the cost of manufacturing the gas into gasoline or other products. Such situations as are discussed in those cases are encompassed within the scope of the departmental regulation found in 30 CFR 221.51, wherein allowance is made for the cost of manufacture.

The appellant's argument that the deductions should have been allowed because the facilities used are said to be similar in nature to those facilities termed by the courts to be "sales facilities" rather than "producing facilities" is not persuasive. Appellant's reliance in this respect on *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672 (1954), and *J. M. Huber Corporation v. Federal Power Commission*, 236 F. 2d 550 (3d Cir. 1956), in its appeal to the Secretary is misplaced. Those cases have no application to the present controversy. There the courts had for consideration whether certain companies engaged in the production, gathering, processing, and sale of natural gas were "natural gas companies" within the meaning of that term as used in the Natural Gas Act (15 U. S. C., 1952 ed., sec. 717 *et seq.*). Whether the facilities used by the lessee in this case are termed sales facilities or producing facilities is immaterial to the question whether deductions for the use of such facilities should be allowed in determining the lessee's royalty obligation to the United States under its lease.

After a full consideration of all of the factors which the appellant has brought to the attention of the Department respecting its marketing of the gas, I must conclude that the charges for which the appellant seeks credit are costs which are properly chargeable to the lessee in carrying out its obligations under the lease and that the appellant, in its settlement for royalty due to the United States, was not entitled to deduct from the sale price received for the oil well gas produced from its two wells on lease GLO 09287 the charges made by the Humble Oil and Refining Company for the cost of transporting the gas to the point of sale in the Duck Lake Field or for the cost of compressing that gas in order that it might be received into the buyer's pipeline.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Geological Survey is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

SIDNEY A. MARTIN, C. C. THOMAS

A-27410

*Decided April 1, 1957***Oil and Gas Leases: Applications**

In the absence of anything to the contrary appearing in an offer for an oil and gas lease, it is proper to assume that an offer describing lands according to the official plat of survey is an offer to lease the described lands as shown by that plat.

Oil and Gas Leases: Applications—Oil and Gas Leases: Rentals

An offer to lease lands for oil and gas purposes accompanied by insufficient rent to cover the lands described in the offer may not be rejected as to part of the lands described in the offer in order that the rental payment submitted with the offer will be sufficient to cover the remaining lands.

Oil and Gas Leases: Applications

Where an oil and gas lease offer is rejected because sufficient rent did not accompany the offer and the offeror appeals on the ground that the lands described in the offer are not the lands sought by the applicant, the appeal constitutes, in effect, an amendment of the offer.

Oil and Gas Leases: Applications

It is proper to reject an application for an oil and gas lease where the land sought is not described with sufficient clarity to identify it.

Oil and Gas Leases: Cancellation

Where an oil and gas lease is prematurely issued before final action has been taken on a prior offer to lease the land, there must be a finding that the prior offeror is entitled to receive a lease on the land before the lease is canceled.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

C. C. Thomas¹ has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management, dated July 18, 1956, wherein that official vacated two decisions of the manager of the land office at Billings, Montana. The first decision vacated, that of November 2, 1954, reinstated the offer, BLM (ND) 027029, filed by Mr. Thomas to lease certain lands in North Dakota under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. III, sec. 226). The second decision vacated, dated November 26, 1954, called upon Sidney A. Martin to show cause why his oil and gas lease, BLM (ND) 027325, issued under section 17 of the Mineral Leasing Act, should not be canceled as to the lands covered thereby included in the Thomas offer.

Thomas filed his offer on October 12, 1951, to lease the following described lands in T. 130 N., R. 106 W., 5th P. M., North Dakota:

Sec. 1—Lots 8, 12

Sec. 2—Lots 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, and bed of Little Missouri River adjoining said lands to its median line

¹ Marvin J. Sonosky, attorney for Henry S. Morgan, filed a brief *Amicus Curiae*.

Sec. 3—Lots 1, 2, 6, 7, 8, 9, 12, and bed of Little Missouri River adjoining said lands to its median line

The total area requested was stated, under Item 2 of the offer, to be 627.07 acres, for which Thomas remitted rental in the sum of \$314.

On April 27, 1954, the manager rejected the Thomas offer in its entirety under the authority of 43 CFR 192.42 (g),² which, at that time, required the rejection of any offer for an oil and gas lease which was not completed in accordance with the regulations embodied in 43 CFR, Parts 191 and 192, and the instructions printed on the "Offer and Lease Form" and which was not accompanied by the payments required by those regulations. The manager stated that the area of the bed of the river included in the offer was 69.43 acres, that the correct acreage of land covered by the offer was 696.50 acres, and that the correct advance rental which should have accompanied the offer was \$348.50. The manager held that Thomas had not submitted with his offer the full first year's rental of 50 cents an acre or fraction thereof for the land requested, as required by 43 CFR 192.42 (e) (2).³ He informed Thomas that if a new offer were filed it would be subject to intervening filings and that it would not retain the priority of the original filing date.

On June 3, 1954, Thomas tendered the additional rental called for by the manager but at the same time appealed from the manager's decision, stating that because there has been a change in the location of the riverbed since the lands had been surveyed, it was impossible for him to determine the exact acreage of the lots applied for as they exist today plus the bed of the river adjoining those lots but that it appeared that the present total acreage of the lots plus the adjoining riverbed in secs. 2 and 3 which he desired to lease would be approximately the same as the acreage of the lots themselves as shown on the plat of survey.

On October 13, 1954, the manager informed Thomas that if his appeal were withdrawn his offer would be readjudicated under an amendment of 43 CFR 192.42 (g) made on July 2, 1954.⁴ That amendment provides that offers defective in certain listed respects will be rejected and will afford the offerors no priority but that offers deficient in other specified respects will be approved provided all other requirements are met. Among those offers which do not, under the amended regulation, lose priority are offers "deficient in the first year's rental by not more than 10 percent" provided the additional rental is paid within 30 days from notice. The manager evidently determined that the Thomas offer, on the basis of the manager's computation of the acreage in that offer, was not deficient in the first year's rental

² As set forth in Circular 1794, July 23, 1951 (16 F. R. 7419).

³ As set forth in Circular 1773, November 29, 1950 (15 F. R. 8582).

⁴ Circular 1875 (19 F. R. 4191).

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by more than 10 percent. The manager stated that that amendment of the regulations had been made retroactive to include all pending offers. The appeal was withdrawn and on November 2, 1954, the decision of April 27, 1954, rejecting the Thomas offer, was vacated and the Thomas offer was reinstated.

In the meantime, however, on September 27, 1954, the manager had issued a lease to Martin covering all but two of the lots for which Thomas had applied. Martin's lease was based on an offer filed on October 25, 1951, for specified lots and subdivisions in secs. 1, 2, and 3 as well as other lands in the township. On November 26, 1954, the manager called upon Martin to show cause why his lease, as to the lots in conflict with the lots covered by the Thomas offer, should not be canceled. The manager gave as his reason for that action the fact that the Martin lease had been issued before final action had been taken on the prior offer of Thomas.

Martin appealed from that decision and the Acting Director, in his decision of July 18, 1956, held that the determination of the acreage included in the Thomas offer was based upon the description given in that offer as shown by the official plat; that if the configuration of the lots applied for had changed because of shifts in the bed of the river, the offeror should have furnished a metes and bounds description of the lands applied for as they are presently situated, so that they could be identified on the ground; that under the regulations in effect when the Thomas offer was filed it was proper to reject the offer for failure to submit sufficient rent; that the Thomas offer was not an allowable offer until June 3, 1954, when Thomas submitted the additional rental; that at that time Martin had on file an allowable offer for the lots in conflict; and that, while the requirement with respect to the payment of advance rental had been relaxed, the amended regulation could not be applied retroactively to defeat Martin's rights. The Acting Director therefore held that the rejection of the Thomas offer on April 27, 1954, was correct and that since the Martin offer was the first allowable offer for the land Martin had a statutory preference right to a lease on the land. He accordingly affirmed the issuance of the lease to Martin.

In his appeal to the Secretary, Thomas contends, in effect, that his estimate of the acreage contained in his offer is correct; that because of the changes in the course of the river the lots are not now the same size as they are depicted on the official plat of survey; that the bed of the river now occupies some of the land shown on the plat of survey as lots; that the manager's computation of the acreage contained in his offer, being based on the total acreage of the lots as shown by the official plat of survey plus the riverbed as also shown on the plat is erroneous; that while he paid the additional rental re-

quired by the manager, it is highly probable that this payment is for acreage which does not exist; and that any attempt to describe the bed of the river by metes and bounds would be entirely conjectural and would be obsolete as soon as the stage of the river changed or the location of the riverbed had been changed as a result of flood.⁵ He also argues that his offer should have been rejected as to the riverbed lands on the ground that those lands were not sufficiently described to identify them on the ground or to compute rentals thereon; and that if his offer had been rejected as to those lands the rental which he submitted with his offer would have been more than enough to cover the lots for which he applied. Contrary to the above argument, he states that it has been customary to issue leases for surveyed lots adjoining meandered streams and for the beds of the streams to offerors who describe the lands applied for in similar language to that contained in his offer. Mr. Thomas also contends that the amendment of 43 CFR 192.42 (g) made on July 2, 1954, has been held by the Bureau of Land Management to be retroactive in its effect, applicable to all pending offers for oil and gas leases, contrary to the ruling made by the Acting Director in his decision of July 18, 1956.

Mr. Thomas seems to be arguing that the land described in his offer is not the land which he seeks to lease. He apparently seeks 627.07 acres in secs. 1, 2, and 3 of the township but just which acreage he seeks he has not yet made clear. He states that the land he seeks now embraces portions of the bed of the river as it winds through secs. 2 and 3. In other words, he does not want to lease the land described in his offer, which is shown on the plat of survey as lots and the riverbed adjacent to certain of those lots. He seems to be arguing further that his offer, which was rejected in the first instance prior to the change in the regulation under which offers deficient by not more than 10 percent in the rental payment could be allowed if all other requirements were met, is entitled to the benefit of that amendment, notwithstanding the fact that he contends his offer was not deficient in the rental payment because all he seeks is 627.07 acres, for which he submitted the proper rental.

The Thomas offer must be judged by the description given therein. It describes specific lots and the bed of the river adjoining certain of those lots. Nothing in the offer indicates that the bed of the river now occupies portions of those lots or that less than the lands described therein is sought. In the absence of anything to the contrary appearing in the offer, it is proper to assume that an offer for an oil and gas lease describing lands according to the official plat of survey is an offer to lease the described lands as shown by that plat. Taking the Thomas offer at its face value, we must conclude that the manager was correct

⁵ The appeal to the Secretary, in this respect, presents essentially the same argument as that made to the manager in the appeal which was later withdrawn.

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in construing the offer as he did and in adding to the acreage of the lots applied for the acreage of the riverbed lands, also applied for, and in determining that Mr. Thomas' rental payment was not sufficient to cover the total acreage applied for.

We come then to the question raised by Mr. Thomas' appeal from the manager's decision rejecting his offer and again raised in his appeal to the Secretary. Mr. Thomas contended then and contends now that he is not seeking a lease on the land described in his offer. He admits, in his appeal to the Secretary, that the offer as originally filed does not describe the lands on which he seeks an oil and gas lease. The most logical interpretation which can be placed upon Mr. Thomas' argument is that by his appeal he attempted to amend his offer so that it would cover only 627.07 acres of land. Viewed in this light, the attempted amendment must be considered as having been filed on June 3, 1954, the date on which his appeal from the manager's decision was filed, at which time the Martin offer was pending. As an amendment of an offer is effective only from the time the amendment is filed, the Thomas offer, as amended, should, properly, have been suspended to await the disposition of the prior application of Mr. Martin. As the Martin application has now been determined to have been a proper application, subject to allowance, and as it was filed prior to any attempt on the part of Mr. Thomas to amend his application, Mr. Thomas cannot complain that his application was finally rejected by the Acting Director.

This disposition of the case makes it unnecessary to consider the other contentions advanced by Mr. Thomas. However, it may be stated that his contention that his offer should have been rejected in part because of his failure to describe the riverbed lands in sufficient detail to identify them or to compute rentals thereon is without merit. The lands described in the offer may be readily identified from the plat of survey and to obtain the acreage in the riverbed lands described in the offer is a simple matter of computation. The river which runs through the township has been meandered and the lands lying on each side of the river have been surveyed into lots of varying sizes. The riverbed being identified on the official plat of survey, it is a simple process to compute the acreage in a given portion of that riverbed.

With respect to the contention that if the offer had been rejected in part the rental submitted would have been sufficient to cover the lots described in the offer, it is sufficient to say that it would have been improper for the manager to have rejected the offer as to the riverbed lands, even if they had not been sufficiently described to permit identification, and, at the same time, to have issued a lease on the acreage included in the lots, where the rental submitted with the offer, covering, presumably, the lots plus the riverbed, was sufficient only to

cover the lots. It is not within the province of a manager, by rejecting an offer in part, to, in effect, validate an offer which did not comply with the regulations when it was filed. Cf. *Arnold R. Gilbert*, 63 I. D. 328 (1956).

In our view of the case, it was error for the manager to have reinstated the Thomas offer on the ground that the change in the regulation, effective after the rejection of that offer, made the offer an acceptable one. By Mr. Thomas' appeal from the manager's decision he had denied that he was seeking the land described in his offer and there was no occasion, therefore, for the manager to have attempted to proceed with the adjudication of the Thomas offer on the basis that the payment submitted with that offer was not deficient in the first year's rental by more than 10 percent. The manager should, properly, have forwarded the Thomas appeal to the Director of the Bureau of Land Management. As the regulation was not applicable in this case, it is unnecessary to determine whether, in a proper case, the regulation may be applied to an offer which had been rejected prior to the amendment of the regulation.

In all of the circumstances of this case it must be held that the offer as submitted described more land than the total acreage stated under Item 2 of the offer; that the rental payment submitted with that offer was not sufficient to cover the land described in the offer; that the attempt to redescribe the land, made by Mr. Thomas in his appeal from the rejection of his offer was, in effect, a new offer, effective for priority purposes on the date the appeal was filed; that that new offer was junior to the offer of Mr. Martin, filed on October 25, 1951; and that the new offer does not describe the lands sought with certainty and would, in any case, be subject to rejection.

While the manager was in error in issuing to Sidney A. Martin a lease on part of the land covered by the original Thomas offer while the rejection of that prior offer was on appeal (43 CFR 192.42 (m)), nevertheless, since it has now been determined that the Thomas offer is not subject to allowance, there is no occasion to cancel the Martin lease. *Madison Oils, Inc., T. F. Hodge*, 62 I. D. 478 (1955).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director of the Bureau of Land Management of July 18, 1956, insofar as it held that the Thomas offer had been properly rejected and insofar as it vacated the order to show cause issued to Sidney A. Martin is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

ARTHUR BAKER ET AL., SKRMETTI REALTY CO.

A-27416

A-27417

Decided April 1, 1957

Color or Claim of Title: Improvements

The fact that land held under color or claim of title may have been improved is not sufficient to meet the requirement of the Color of Title Act that valuable improvements shall have been placed on the land where it is shown that the improvements were destroyed prior to the time the applicant acquired his claim of title and where it is shown that the improvements were not on the land when the application to purchase was filed.

Color or Claim of Title: Improvements

Improvements placed on land held under color or claim of title after the discovery by the claimant that his title to the land is defective do not satisfy the requirement of the Color of Title Act that the land shall have been improved.

Color or Claim of Title: Improvements

The mere surveying and platting of land is not the placing of improvements thereon within the meaning of the Color of Title Act.

Color or Claim of Title: Generally

A person who has a contract with another under which he is authorized to subdivide and sell land assertedly owned by the latter and which does not purport to vest any title to the land in the former cannot be said to hold the land under claim or color of title.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On June 20, 1955, Arthur Baker, Ralph J. Baker, and Walter N. Wentzell filed an application (BLM 040251) to purchase 133.45 acres of land, described as all of fractional sec. 23 (lots 1, 2, 3, and 4), T. 9 S., R. 8 W., St. Stephens Mer., Mississippi. On July 13, 1955, Paul M., Thomas J., Patrick F., MaryAnn, and Thelma Skrmetti, doing business as Skrmetti Realty Co., filed a similar application covering 449.75 acres of land, described as lot 1, sec. 13, lots 1, 2, 3, and 4, sec. 23, and lots 1, 2, 3, 4, 5, 6, 7, and 8, sec. 24, T. 9 S., R. 8 W., St. Stephens Mer., Mississippi.

The lands are situated on Horn Island, a long, slender island off the coast of Mississippi, which, at the time of its first survey in 1846, did not extend into T. 9 S., R. 8 W. The western end of the island has, however, been built up by accretion and in 1929 the land which had accreted to the island was surveyed. The plat of survey, accepted on December 10, 1930, shows this accreted land as fractional sections 13, 23, and 24, T. 9 S., R. 8 W. The plat shows 2.14 acres in sec. 13, 133.45 acres in sec. 23, and 314.16 acres in sec. 24, a total of 449.75 acres in the three sections and obviously the lands covered by the Baker and Skrmetti applications. The field notes of survey (Vol. 65, Mississippi Field Notes, p. 920) state that the available evidence indicates that the

area surveyed had formed, as land above mean high tide, within 10 to 15 years prior to the survey. The records of the Department show that after the 1929 survey the State of Mississippi, on April 3, 1931, selected these same lands under the swamp land grant embodied in the act of September 28, 1850 (43 U. S. C., 1952 ed., secs. 982-984), but that the selection was rejected on December 9, 1931. Again, on August 19, 1953, the State selected fractional sections 13 and 24. That selection (BLM 035147) was rejected on March 28, 1955, not only because the lands were found not to be of swamp character but because the lands were not in existence at the time of the passage of the act of September 28, 1850. Obviously, since these lands were not in existence on the date of the swamp land grant to the State, the lands did not pass to the State under that grant.

Both of the appellants' applications were made under the Color of Title Act (43 U. S. C., 1952 ed., Supp. III, sec. 1068). Section 1 of that act, as amended on July 28, 1953, provides that the Secretary of the Interior—

* * * (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre: *Provided*, That where the area so held is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder: * * * *And provided further*, That no patent shall issue under the provisions of this Act for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant.

As the lands are shown not to have been in existence on January 1, 1901, it is clear that the claimants cannot qualify under the second, or (b), portion of section 1 of the statute set out above.

The applicants in each case admit that the land claimed by them has not been cultivated. Therefore, in order to prevail, they must show to the satisfaction of the Secretary of the Interior that the land has been held in good faith and in peaceful, adverse possession under claim or color of title by the applicants, their ancestors, or grantors for more than 20 years and that valuable improvements have been placed on the land claimed by each.

The Baker applicants depend for their showing with respect to improvements on the fact that a building and a pier had, in 1946, been

placed on the land claimed by them and the further fact that they placed a building on the land in 1955 after they discovered, about December 10, 1954, that they did not have title to the land. They state that the building and pier constructed in 1946 were destroyed by a hurricane in September 1947. The Skrmetti applicants state that the land claimed by them was surveyed and platted in 1954, and that such work satisfies the improvement requirement.

On August 5, 1955, the Chief, Adjudication Section, Eastern States Office, Bureau of Land Management, rejected both applications and, on August 23, 1956, the Acting Director, Bureau of Land Management, in separate decisions, affirmed the action taken by the Eastern States Office.

The Acting Director held that the improvements which had, in 1946, been constructed on the land sought under the Baker application but which had been destroyed in 1947 were not valuable improvements within the meaning of the Color of Title Act and that improvements placed on the land in 1955, after the applicants discovered that they had no title to the property, would not satisfy the requirements of the act. He held that the surveying and platting of the land sought by the Skrmetti Realty Co., which surveying and platting is alleged to have been done for the purpose of subdividing the land into lots, laying out streets, harbors, etc., were not improvements of that land within the meaning of the act. He noted further that while the Skrmetti application was filed in the name of Paul M. Skrmetti and four members of his family, doing business as Skrmetti Realty Co., for 449.75 acres, the data submitted in support of the application did not show any purported title in any member of the family except Paul M. Skrmetti. He pointed out that the Color of Title Act authorizes the issuance of a patent for not to exceed 160 acres under any one claim. In both decisions the Acting Director pointed out that there is an apparent conflict between the two applications with respect to the land in sec. 23 and that even if the applications were otherwise allowable the conflict must be settled before the applications could be further considered by the Bureau.

The applicants have taken separate appeals to the Secretary of the Interior. Each denies that there is a conflict between the applications and each states that if there is a conflict it can be amicably settled. The Skrmetti Realty Co. concedes that its claim must be limited to 160 acres and has requested that its application be amended to include only that amount of land. If the Skrmetti claim were amended to cover not more than 160 acres out of the 449.75 acres originally applied for, other than the 133.45 acres claimed under the Baker application, the conflict would be eliminated and for the purposes of this decision the Skrmetti claim will be considered as having been amended to eliminate any conflict.

The Baker applicants have submitted an abstract of title covering the lands in fractional secs. 13, 23, and 24. They base their claim to the land in sec. 23 on a deed dated February 6, 1953, from Wakeman B. Curtis. Curtis acquired his claim to title, not only to the land in sec. 23, but also to the land in secs. 13 and 24, under deed dated February 4, 1947, from E. L. Trenholm who, in turn, acquired his purported title to the land in the three sections by deed dated June 22, 1926, from N. D. Thomas. Thomas held under a patent dated March 24, 1925, from the State of Mississippi, purporting to convey "All that certain land, sand-bar, or sand pit constituting the western end of Horn Island, in Harrison and Jackson Counties, Mississippi, lying or being in * * * Sections 13 * * * 23 and 24, Township 9 South, Range 8 West * * *." The patent recited that the land had been donated to the State by the United States under the Swamp Land Act.

Turning first to the showing made by the Baker applicants and assuming, without deciding, that the Baker applicants and their grantors have held the land in sec. 23 in good faith and in peaceful, adverse possession under claim of title for more than 20 years, the question is whether the improvements placed on the land claimed under the Baker application meet the requirements of the Color of Title Act. Does the fact that at some time in the past improvements have been placed on public land held under claim of title require the Secretary of the Interior to issue a patent for the land, where the other requirements of the act have been met, even though those improvements are not on the land when the application for a patent is filed? Further, is the Secretary of the Interior required to issue a patent where the only improvements now on the land are those placed there after the applicants discovered they did not have good title?

That portion of the act with which we are here concerned provides that it shall be shown to the satisfaction of the Secretary that "valuable improvements have been placed on such land." While it is not specified that the improvements must have been placed on the land by the applicant for a patent or that they must have been placed on the land before the deficiency in title is discovered, it seems clear that the intent is to provide a means by which one who has in good faith improved land in the belief that he has title thereto or who has purchased improved land in good faith can obtain a patent from the Government. The first, or (a), portion of section 1 of the act is intended to benefit those persons who, if the land has not been reduced to cultivation, can show not only that they have been in peaceful, adverse possession of land in good faith for more than 20 years under claim of title but who can show, in addition, that the land is now improved and that that improvement took place at a time when the claimants believed their title to be good.

The requirement that land sought under claim or color of title

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must be either improved or cultivated was included in the Color of Title Act from the date of its enactment, December 22, 1928 (43 U. S. C., 1952 ed., sec. 1068). This clearly demonstrates that from the very beginning the Congress determined that peaceful adverse possession of public land for more than 20 years under claim or color of title was not, standing alone, sufficient to warrant patenting of the land to the claimant. Even if the claimant had expended a considerable amount of money in purchasing the land from his grantor, he was not to be entitled to a patent for the land. The Congress determined that, in addition, valuable improvements must have been placed on the land or some part of the land must have been cultivated. Obviously the intention was that a claimant would have to show these additional equities before he would be entitled to a patent for the land. Or, stated conversely, it was evidently thought that if a claimant had spent time and money in making valuable improvements or in cultivating the land, or had paid for such improvements or cultivation in buying the land, it would be unfair to deprive him of the fruits of his labor or expenditures. This is clearly evidenced by the fact that under section 2 of the act (43 U. S. C., 1952 ed., sec. 1068a) a claimant is required to pay the United States only for the appraised value of the land "exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest." It therefore seems that the proper interpretation of portion (a) of section 1 of the act is that valuable improvements must exist on the land at the time an application is filed for the land and that such improvements must have been made prior to the time that the applicant became aware of the fact that his title to the land was defective.

Here the Baker applicants show merely that improvements had been placed on the land at one time and that the land was improved by them after they discovered they did not have good title. The improvements said to have been placed on the land in 1946 were not on the land when the applicants acquired their claim. In fact they did not hold the land under any claim of title until more than five years after the improvements are said to have been destroyed. In February 1953, when they acquired their claim, the land was unimproved and they presumably paid nothing for the destroyed improvements. Nor did the applicants place improvements on the land during the approximately 22 months in which they held the property before they discovered the defect in their title. It was not until after that defect was found that the applicants improved the property.

In these circumstances, it would appear that the element of good faith is entirely lacking with respect to the improvements made by the Baker applicants in 1955 and that, with respect to the improvements destroyed in 1947, the applicants stand in exactly the same

position as they would occupy if these improvements had never been made. Cf. *Homer Wheeler Mannix et al.*, 63 I. D. 249 (1956). There the color of title applicants stated that they had constructed trails on the land which they had maintained from year to year. A field examination of the land, made less than one year after the filing of the application, failed to reveal any evidence of the trails. The Department denied the application on the ground that the applicants had failed to show to the satisfaction of the Secretary that valuable improvements had been placed on the land as required by the Color of Title Act. It follows that the Baker applicants are not entitled to the benefit of the Color of Title Act and that their application was properly rejected.

Turning now to the Skrmetti claim, we find that this claim, like the Baker claim, arises through the patent issued by the State of Mississippi to N. D. Thomas. The chain of title recited by the Skrmetti applicants is substantially the same as that shown by the Baker applicants. They base their claim to the land covered by their application on what they term a contract of sale dated October 22, 1954, from the Baker applicants. That contract, a copy of which was submitted by the Baker applicants, recites that the Baker applicants are the owners of certain property on Horn Island, including the land in sections 13, 23, and 24, and that Paul M. Skrmetti is a real estate developer and promoter, who wishes to develop, subdivide, and sell off in lots the property of the first parties. It is agreed by the parties that Paul M. Skrmetti may act as broker in the sale of the property under the terms and conditions set forth in the agreement. The contract does not even purport to vest title in Skrmetti. It seems clear therefore that neither Paul M. Skrmetti, the other members of the family, nor the Skrmetti Realty Co. can claim, on the basis of this showing, to hold the land under color of title.

Aside from this, the requirement that valuable improvements shall have been placed on the land has not been satisfied. The surveying and platting of land is not the placing of valuable improvements thereon. *Helen M. Forsyth et al.*, A-25365 (November 30, 1948). Accordingly, the application made by the Skrmetti Realty Co. to purchase land on Horn Island under the Color of Title Act was properly rejected.

The record indicates that the Board of Supervisors, Jackson County, Mississippi, has filed an application (BLM-038858) under the Recreation Act of June 14, 1926, as amended (43 U. S. C., 1952 ed., Supp. III, sec. 869), for the lands included in the Baker and Skrmetti applications and that action on that application was suspended pending the final disposition of the Baker and Skrmetti color of title applications. The record also indicates that certain persons

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have located mining claims on Horn Island. A protest against the color of title applications was filed in the Office of the Secretary of the Interior on December 7, 1956, after the Baker and Skrmetti appeals (A-27416 and A-27417) were filed. This protest was made by Mr. Joe A. Moore, attorney for A. V. Walker and Elmer H. Gautier.

The record is therefore remanded to the Bureau of Land Management for such action as may now be appropriate on the application of the Board of Supervisors for the land and on any mining claims which may have been located on the land covered by that application.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decisions of the Acting Director of the Bureau of Land Management dated August 23, 1956, affirming the rejection of the Baker and Skrmetti applications to purchase lands in secs. 13, 23, and 24, T. 9 S., R. 8 W., under the Color of Title Act are affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

UNITED STATES v. GEORGE W. BLACK

A-27411*Decided April 1, 1957*

Mining Claims: Determination of Validity—Mining Claims: Discovery

Where a deposit of sandstone is shown not to have a present or prospective market value, it is not a valuable deposit within the mining law and a claim based on such a deposit is properly declared null and void.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

George W. Black has appealed to the Secretary of the Interior from a decision dated August 3, 1956, of the Acting Director of the Bureau of Land Management which affirmed a decision of the manager of the Phoenix land and survey office holding null and void two building stone placer mining claims.

Mr. Black located the mining claims, the Grasshopper Flat Nos. 1 and 2, on February 1, 1948. They lie in sec. 11, T. 17 N., R. 5 E., G. & S. R. M., Arizona, within the Coconino National Forest. On January 16, 1953, the claimant filed an application for a mineral patent (Arizona 04324) covering both claims in which he asserted that the claims contain sandstone in placer form, valuable as a building stone, and that he is entitled to a patent under the United States mining laws (30 U. S. C., 1952 ed., secs. 22, 35, 161). On May 11, 1953, the Regional Forester, United States Forest Service, Department of Agriculture, filed a protest against the claims (43 CFR 205.3). Thereafter, contest proceedings were instituted against the claims

and a hearing was held on October 20, 1953, before the manager of the Phoenix land and survey office. Both parties appeared at the hearing, were represented by counsel, presented witnesses who were subject to cross examination, and submitted briefs at each stage of the proceedings.

The contest was brought on the following charges:

(1) That no discovery of a valuable building rock or other mineral deposit has been made on said mining claims and that said mining locations are null and void;

(2) That the lands embraced in said claims are more valuable for national forest and public purposes than for building stone or any other substance, including erosional debris, there occurring;

(3) That like or similar stone and debris occur over wide areas in this vicinity and northern Arizona generally;

(4) That the economic market for the stone and erosional debris is limited to the local vicinity and that no economic market is available for the stone and erosional debris other than for local use;

(5) That the said mining claims are not held in good faith for mining and milling purposes but are held as residence sites under the guise of the mining law and contrary to the mining law.

Charges 3 and 4 are, in reality, particularizations of charge 1 and these three charges may be considered as a unit.

The mining claims are located in the Coconino National Forest in an area known as Grasshopper Flat or Rainbow Canyon, located a few miles from Sedona, Arizona.

There was a great deal of testimony at the hearing about the value of the land for residential purposes, but in the view we take of the case, the relative value of the land for mining or residence purposes is immaterial. The land covered by the mining claims does not contain any valuable timber, nor is it suitable for grazing (Tr. 11, 12). However, it lies in an area of scenic beauty which makes it desirable as a recreational area (Tr. 30).

It appears that the mineral on the claims is sandstone (Tr. 7); that it is suitable for use in the construction of homes and other small buildings (Tr. 15, 18); that it has been used to some extent for this purpose and as a road fill (Tr. 52, 54); that it exists in substantial quantity on the claims; that sandstone as the common or country rock of the area is of widespread occurrence (Tr. 7, 24), and that the sandstone in the claims is of the same character and appearance as the other sandstone in the area (Tr. 7). It also is undisputed that at the town of Sedona about 3 miles distant from Grasshopper Flat there is an operating quarry offering stone of better quality (Tr. 34, 40); that Black has sold only \$100—\$150 worth of stone from his claims (Tr. 63); and that the rest of the stone taken from the claims had been disposed of in exchange for services (Tr. 66, 70).

Under the mining laws of the United States (30 U. S. C., 1952 ed., secs. 21, 22, and 35) only "valuable mineral deposits" may be located and the lands involved must be valuable for minerals. A discovery of a valuable mineral deposit must be made within the limits of each claim. A valid discovery, it has often been held, is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine. *Castle v. Womble*, 19 L. D. 455 (1894); *Chrisman v. Miller*, 197 U. S. 313 (1905); *United States v. Strauss et al.*, 59 I. D. 129, 137, 138 (1945).

With respect to nonmetallic deposits of widespread occurrence, the pertinent considerations were summarized in *United States v. Strauss et al.* (*supra*, p. 138), as follows:

Gypsum, clay, limestone, and the other kinds of stone here involved have been held to be minerals. *W. H. Hooper*, 1 L. D. 560 (1881); *Alldritt v. Northern Pac. R. R. Co.*, 25 L. D. 349 (1897); *United States v. Barngrover et al.*, 57 I. D. 533 (1942). But whether particular deposits of these and other mineral substances of wide occurrence are *valuable* mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, *held to depend upon the marketability of the deposit*. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. *Ickes v. Underwood et al.*, 78 App. D. C. 396, 141 F. (2d) 546 (1944); *opinion of Acting Solicitor*, 54 I. D. 294 (1933); *Layman v. Ellis*, 52 L. D. 714 (1929). In *Big Pine Mining Corp.*, 53 I. D. 410, 412 (1931), the syllabus said:

"Lands containing limestone or other minerals, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law."

Since these claims are situated in a national forest, the evidence sustaining the validity of the mineral locations must be clear and unequivocal. *United States v. Dawson*, 58 I. D. 670, 679 (1944); *cf. United States v. Langmade and Mistler*, 52 L. D. 700 (1929).

In the absence of any serious dispute that the claims contain sandstone in sufficient quantity and of a quality at least suitable for use in constructing houses, their validity must, in the first instance, rest upon the marketability of the deposit. This factor, in turn, depends upon the existence of a present demand for the sandstone and its proximity to market.

The contestee makes no claim that the sandstone can be sold at any place other than the immediate vicinity of the claim. In fact, the evidence indicates that the potential market for the sandstone is limited to the Grasshopper Flat area, excluding even the Sedona area some

3 miles away (Tr. 12, 21, 78). As to the market in the Grasshopper Flat area, Black could show only that a few houses had been built from stone from his claim, but that the stone had been given away (Tr. 63) so the services could be applied against the assessment work (Tr. 66, 69, 70, 74). As to the potential market, the most favorable view was that if certain subdivisions were developed there might be 300-400 building lots the purchasers of some of which might use stone from Black's claim to build their homes (Tr. 21, 22, 78).

In view of the fact that Black held the claims for 5 years during which the area underwent a rapid development without being able to sell any stone from it for building purposes (except for the few houses built with stone exchanged for services), it is my opinion that there is no present market for the stone of any consequence (*United States v. Estate of Victor E. Hanny*, 63 I. D. 369 (1956)).

Assuming that, all other factors being present, a prospective value is sufficient to validate a building stone claim,¹ I find that the sandstone in these claims has no prospective value. The possibility of a future market hinges upon several contingencies. Even if all of them were to occur the market would be extremely limited and temporary. In such circumstances the claims have only a conjectural, not a prospective, value for mining purposes. *United States v. Underwood*, A-22066, p. 9 (August 11, 1939).

The only other use to which the stone on the claim has been put is to furnish material for fill for roads to a limited extent (Tr. 52, 55, 56, 72). Such use cannot validate a building stone placer claim. *Holman et al. v. State of Utah*, 41 L. D. 314 (1912); *Gray Trust Co.* (on rehearing), 47 L. D. 18 (1919).

Accordingly, I find that the conclusion that there is no market for the sandstone from the claims is correct. In the absence of marketability the deposits of sandstone are not valuable mineral deposits within the meaning of the mining law. *United States v. Strauss et al.* (*supra*); *United States v. Estate of Victor E. Hanny* (*supra*). It follows that charge 1 (including charges 3 and 4) has been sustained and that the claims are null and void.

Since the Acting Director's decision must be affirmed upon this finding above, it is not necessary to consider charges 2 and 5.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director holding the claims null and void is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

¹ *Of. United States v. D. L. Underwood et al.*, A-19293, p. 19 (September 9, 1937), A-22066, pp. 2, 5 (August 11, 1939), rehearing denied June 14, 1940; affirmed *Ickes v. Underwood*, 141 F. 2d 546 (App. D. C., 1944), cert. denied, 323 U. S. 713; and *United States v. Strauss et al.*, 59 I. D. 129, 138.

APPEAL OF TEXAS CONSTRUCTION COMPANY AND HYDE CONSTRUCTION COMPANY

IBCA-73

Decided April 23, 1957

**Contracts: Additional Compensation—Contracts: Specifications—Contracts:
Interpretation—Contracts: Changes and Extras**

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and riprap merely because the Government changed the design prior to the advertisement for bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from the drawings and specifications is immaterial if the degree of uncertainty was not appreciable.

BOARD OF CONTRACT APPEALS

This is an appeal by the Texas Construction Company and Hyde Construction Company, successors in interest, under Contract No. 14-06-D-718, which was on U. S. Standard Form No. 23, Revised April 3, 1942, and dated December 11, 1953. The contract provided for the completion of Webster Dam under the schedule of Specifications No. DC-4052, Webster Unit, Solomon Division, Kansas, Missouri River Basin Project, Bureau of Reclamation. Payments were to be made to the contractor at the unit prices stated in the schedule incorporated in the specifications.

The contractor's claim, which aggregates the sum of \$106,078.75, is based upon an alleged underrun in quantities of items 27 and 28 of the schedule, and is predicated on the theory that these underruns constituted a change entitling it to an equitable adjustment. Item 27 provided for furnishing and placing crushed-rock blanket material, and item 28 provided for furnishing and placing riprap at various locations about Webster Dam, as required by the specifications and drawings made a part thereof.

The sum of \$95,953.75 is sought relative to the alleged change in the quantity specified in item 27, and \$10,125 relative to the alleged change in quantity specified in item 28.

The estimated quantity in the bidding schedule of item 27 was 82,150 cubic yards, and of item 28 was 171,250 cubic yards.

By letter dated July 12, 1955, the contractor's Project Manager wrote to the Construction Engineer of the Bureau of Reclamation as follows:

It appears that the actual quantities of crushed rock blanket material and riprap will underrun the estimated quantities as set out in the above specifications.

I would appreciate it if you will furnish me a more accurate quantity of each item in order that we will not manufacture more of the material than is needed to complete the job.

The Construction Engineer's reply to the letter, which was dated July 15, 1955, stated that a preliminary quantity computation had indicated that the quantities would closely approximate the following: item 27, 50,000 cubic yards; item 28, 160,000 cubic yards.

In a letter dated August 3, 1955, the contractor's Project Manager further informed the Construction Engineer that its subcontractors, E. C. Schroeder Construction Co., Inc., and Lester O'Borny Trucking Company, had made verbal protests regarding "the quantity changes," on the ground that their costs for performing the work had been substantially increased by these changes, and that they were preparing letters of protest, which would contain a statement of their increased costs and which would be forwarded for the Government's consideration. Subsequently, a letter dated August 6, 1955, from the E. C. Schroeder Co., Inc., to the contractor, was forwarded to the office of the Bureau of Reclamation at Stockton, Kansas. In this letter, the subcontractor served notice that it claimed an additional 34 cents per cubic yard for item 27 and 25 cents per cubic yard for item 28, because the reduction in quantities of riprap and crushed-rock had increased their original prices, which were based on 253,400 cubic yards of combined material.

The Bureau's Construction Engineer, in a letter of September 23, 1955, took the position that the claim was not the result of changes or changed conditions, but that if the contractor wished to protest under paragraph 12 of the specifications, the protest should state in detail the basis for the claim. This suggestion was followed by the contractor's Project Manager.

In the letter of October 5, 1955, the contractor's Project Manager argued that "the contractor should be entitled to equitable adjustment of the unit price because the estimated quantities were not reasonably approximate." Thus, he pointed out:

In regard to Item 28, while the percentage of variation between the original estimated quantities and the preliminary final quantity computation is not as excessive as the percentage of variation pertaining to Item 27, the total additional cost incurred in connection with both of said items as a result of the changed quantities must be based on the ratios of the quantity under Item 27 and the quantity under Item 28. The ratio of schedule quantities under Items 27 and 28 was approximately one to two, whereas the ratio of quantities under Items 27 and 28 based on the preliminary final quantity computation as set for [sic] in your letter of July 15th, is approximately one to three.

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Inasmuch as sound construction practice on the part of the contractor required that the crushed rock and the rip-rap be produced simultaneously and from the same quarry, a great increase in production costs of both items resulted from the unbalancing of the ratio between the two. Such increase in cost to the contractor is in addition to losses caused by the separate reductions in quantities under the two items.

In the letter of January 17, 1956, the contractor's Project Manager gave further details concerning the unbalancing of its production of riprap and blanket material, and further pointed out that in connection with the hauling thereof it had acquired special, custom-built items of equipment, the number of which had been determined by the ratio of the total estimated quantities of riprap to the total estimated quantities of blanket material, and that it had constructed approximately 3.5 miles of road with maintenance and parking facilities also determined by the estimated quantities. In conclusion, the Project Manager stated:

In connection with this claim the contractor desires to emphasize that the mistake in the estimated quantities was a unilateral, as distinguished from a bilateral mistake. On the drawings constituting a part of the bidding documents, there were not sufficient dimensions upon which the contractor could have calculated the actual quantities under Item 27. Furthermore, the Specifications obligated the Contractor to place the crushed rock blanket material, not only as shown on the drawings, but "elsewhere as directed" including, without purporting to be limited to, certain locations set forth in said Specifications. The contractor therefore, at the time of submission of its bid could not have correctly nor approximately correctly computed the actual quantities or blanket material required.

In his decision, which was in the form of a letter dated March 8, 1956, the contracting officer held that the claim of the contractor was one for unliquidated damages which he lacked authority to entertain and settle. Consequently, he made no findings of fact with respect to the claim.

In view of the contention of the contractor that a change in the contract requirements was involved, the Board requested that the contracting officer make findings of fact with respect to the claim, and these were issued by him under date of March 1, 1957. The contractor was afforded an opportunity to accept, reject or qualify the findings within 30 days from the date of the receipt thereof, and submitted a series of comments on the findings under date of April 15, 1957. In these comments the accuracy of the findings, with one exception, is not challenged, but the legal argument is made that they amount to an admission that a change in the contract requirements was effected.

The provisions of the specifications governing riprap and crushed-rock blanket materials are paragraphs 69, 70, and 71, and the relevant specification drawings are Nos. 26, 27, 28, and 36. Paragraph 69 of

the specifications specified the quality and gradations of the materials for crushed-rock blanket and riprap, and indicated the types of acceptable deposits from which they could be obtained. Paragraph 70 provided for the placing of a crushed-rock blanket 12 inches in thickness "as shown on the drawings and elsewhere as directed," including certain designated locations. Paragraph 71 similarly provided for the placing of riprap "as shown on the drawings and elsewhere as directed," including certain designated locations. The above-mentioned drawings indicated a crushed-rock blanket 12 inches in thickness and riprap at various locations varying from $3\frac{1}{2}$ to 2 feet in thickness, and averaging approximately 3 feet in the designated areas. Paragraph 4 of the specifications consisted of a standard provision in Bureau contracts providing that the quantities noted in the schedule were approximations for comparing bids, and that no claim should be made against the Government for excess or deficiency therein, actual or relative.

In his findings the contracting officer found the actual deficiencies in quantities under items 27 and 28 to be substantially as claimed by the contractor's Project Manager in his letter of January 17, 1956. The extent of these deficiencies was as follows:

Item No.	Item	Unit	Schedule quantity	Final quantity	Deficiency, cu. yd.	Percent
27	Furnishing and placing crushed-rock blanket	cu. yd.	82, 150	50, 476	31, 674	39
28	Furnishing and placing riprap	cu. yd.	171, 250	161, 285	9, 965	6

The contracting officer attributed the major part of the deficiency under item 27 (26,400 cubic yards) and a minor part of the deficiency under item 28 (2,750 cubic yards) to the fact that the schedule quantities for these items had been based on a design requiring placement of a crushed-rock blanket 18 inches in thickness and riprap 3 feet in thickness on the upstream slope of Zone 1 of the dam embankment above the berm at elevation 1,890 and on the upstream slope of the dike embankment. While this design was changed a short time before the advertisement for bids was issued, due to an oversight, the schedule quantities were not corrected. The contracting officer accounted for the remaining deficiencies—5,274 cubic yards under item 27 and 7,215 cubic yards under item 28—by explaining that the precise extent or the location of the surfaces where crushed-rock material or riprap was to be placed could not be accurately ascertained in advance of the performance of the work.

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Notwithstanding the error in the estimated quantities in the bid schedule and the element of uncertainty in the areas to be covered by the crushed-rock blanket and riprap, the contracting officer further found that the contractor in bidding could have ascertained from the information given on the drawings and the provisions of the specifications that the required quantities of crushed-rock blanket and riprap would be in the proportion of 1 to 3, respectively, rather than in the proportion of 1 to 2 indicated by the estimated quantities of the schedule.¹ Although the contracting officer conceded that areas described in the specifications were variable, he pointed out that "these areas constituted such a small part of the total area involved that the possible effect of such variation on the quantities here in question was negligible," and that the provision for placing crushed-rock blanket and riprap "elsewhere as directed" was intended to provide only "for possible minor extensions of the crushed-rock blanket and riprap in the spillway approach and outlet channels and the outlet-works outlet channel, which are the only areas within the scope of the contract where crushed-rock blanket and riprap or other similar protective work might conceivably be required but was not shown on the drawings."

Finally, the contracting officer made a number of findings which go to the extent of the additional costs incurred by the contractor. Thus, he found (1) that while the quality and gradation of materials for crushed-rock blanket and riprap materials required by the specifications was "such as to permit the production of these two materials from a common source," the proportion of quarry run material too small in size to meet the gradation requirements for riprap "could be controlled to some degree by regulating the drilling and blasting operations"; (2) that while the deficiencies in the final quantities in items 27 and 28 resulted in a corresponding decrease in the utility under the contract of the contractor's access road, plant and equipment, and in a surplus at the quarry of rock too small to meet the gradation for riprap, there was a local market for the rock suitable for crushed-rock blanket that the contractor's subcontractor has been exploiting by maintaining a quarry operation at the site and supplying such material for the local market; (3) that little or none of the plant and equipment used in the furnishing and placing of the riprap and crushed-rock blanket was "special" in the sense that it was not suitable for other similar purposes; and (4) that, since the "rate of placement of by far the major part of the crushed-rock blanket and riprap was limited by the rate

¹ This is based on the fact that the average thickness of the riprap shown on Drawings No. 26, 27, 28 and 36 of the specifications is approximately 36 inches, while the thickness of crushed-rock blanket shown on these drawings is 12 inches.

of placement of earthfill in the dam embankment," the deficiencies in quantities of these materials did not reduce the period required for hauling and placing of these materials.

The contractor has requested that the appeal be decided on the record before the Board without a hearing, and has challenged primarily the legal theory of the Government. The Board accepts as correct the findings of fact, as well as the conclusions, of the contracting officer.

It is well settled that where the specifications contain an "approximate quantities" provision of the type involved in the present case the mere existence of an overrun above or an underrun below schedule quantities is not a sufficient basis for the allowance of an equitable adjustment predicated on the actual cost of the work to the contractor. Moreover, a contractor is not entitled to additional compensation in such cases merely because the Government has made an error in making up the estimates,² if such error was made, as in the present case, *prior* to the time the advertisement for bids was issued, and if in fact the schedule quantities could have been verified by the contractor from the information supplied by drawings and specifications, as the contracting officer has found.³

A contractor is entitled to an equitable adjustment, to be sure, if the contracting officer has effected a change in the requirements of the contract, but a change made before the award of the contract is not a change in this sense.⁴ It is also true, to be sure, that there was in the present case some degree of uncertainty in estimating the quantities of crushed-rock blanket and riprap, but since the contracting officer has found that the degree was not appreciable, the Board must conclude that it was not sufficient to prevent the contractor from arriving at a close estimate of the quantities that would actually be required. The deficiencies in items 27 and 28 not due to the failure to correct the original estimate were, respectively, less than 61½ percent and 41½ percent of the estimates, and, surely, under a contract containing an approximate quantities provision, the contractor was bound to allow for a reasonable variation from the estimates. If, on the other hand, such variations were, as the contractor seems to contend, unreasonable,

² See *General-Shea-Morrison*, Comp. Gen. B-114585 (June 19, 1953), cited in *R. P. Shea Company*, 62 I. D. 456, 462 (1955).

³ The present case is fundamentally similar to *J. D. Armstrong Co., Inc.*, 63 I. D. 289, 303-11 (1956), where there was also a miscalculation by the Government but the contractor could have ascertained the actual work required from the drawings and specifications.

⁴ The contractor cites *M. Hoard*, IBCA-6 (May 11, 1955) in support of its contention that there was a change in the contract requirements, but in that case the reference was to a change made during the performance of the contract.

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the contractor's case would be based on a breach of an implied condition of reasonability in the contract, and this would constitute a claim for unliquidated damages which the Board would lack jurisdiction to determine.⁵

As for the contractor's contentions that the deficiencies in the estimates of items 27 and 28 unbalanced the production ratios for these items, and affected its hauling arrangements, while these allegations appear to be true, no particular production ratio, or hauling arrangement was prescribed by the specifications. However sound the contractor's practices may have been in these respects, no changes in the specifications were consequently involved. The fact that the actual costs per unit of the work performed by the contractor in performing the contract has turned out to be more than his estimated bid price per unit does not in itself entitle the contractor to additional compensation.⁶

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer, dated March 8, 1956, is affirmed.

THEODORE H. HAAS, *Chairman*.

I concur:

WILLIAM SEAGLE, *Member*.

I concur in the result:

HERBERT J. SLAUGHTER, *Member*.

J. C. NELSON ET AL.

A-27321

Decided April 26, 1957

Mining Claims: Contests

Where mining claimants contest the issuance of oil and gas leases and the filing of applications therefor, alleging the existence of prior valid mining claims, but it is impossible to identify the land covered by the mining claims from the land descriptions given in the notices to contest and in

⁵ *R. P. Shea Company*, 62 I. D. 456, 463 (1955).

⁶ *Hirsch v. United States*, 104 Ct. Cl. 45 (1945).

the location certificates of the claim and timely objection to the defective descriptions is made by the contestees, the contest proceedings can be dismissed for this reason alone.

Mining Claims: Discovery

Recitals of discovery in notices of location are not evidence of discovery nor are affidavits of annual assessment work or notices of intention to hold claims in years when assessment work is not required.

Mining Claims: Contests

Mining claimants who apply to contest oil and gas leases and applications for leases have the burden of showing the validity of their claims and must suffer the dismissal of their contests and the invalidation of their claims if they fail to sustain their burden.

Mining Claims: Contests

Where contests by mining claimants have been dismissed by the Bureau of Land Management for failure to show a discovery, a rehearing will not be granted to permit the claimants to present evidence of discovery where such evidence was available at the time of the original hearing and the 38-year history of the claims shows laches on the part of the claimants in sustaining their claims.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. C. Nelson and William Habbersett have appealed to the Secretary of the Interior from a decision of January 24, 1956, by the Director of the Bureau of Land Management holding the Sid oil shale placer mining claims Nos. 1 through 22, inclusive, invalid. The appellants assert possessory title to the claims which are situated in Rio Blanco County, Colorado.

The township in which the lands here involved are located was classified on May 23, 1916, as valuable for petroleum and nitrogen. On June 9, 1930, the entire township was withdrawn under Executive Order No. 5327 of April 15, 1930, pursuant to the act of June 25, 1910, as amended by the act of August 24, 1912 (43 U. S. C., 1952 ed., secs. 141-143), from lease or other disposal and reserved for purposes of investigation, examination and classification. The withdrawal did not affect or impair the rights of bona fide occupants or claimants of oil or gas bearing lands who, on the date of withdrawal, were diligently prosecuting work leading to discovery, so long as the claimants continued in diligent prosecution of such work. On April 22, 1931, the withdrawal was modified to permit oil and gas leasing of the lands in the township here involved but is otherwise still operative.

Several oil and gas leases have been issued and an application filed

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under the Mineral Leasing Act (30 U. S. C., 1952 ed., secs. 181 *et seq.*) for lands which are assertedly covered by the appellants' claims. Effective July 1, August 1, and September 1, 1952, respectively, oil and gas leases Colorado 04574, 04575, and 04576 were issued to H. S. Quick on lands which the appellants assert are covered by the Sid placers, located on July 5, 1918. On September 18, 1952, the mining claimants filed application to contest No. 56 stating that possessory title to the land covered by the Sid claims is held by them and that they intend to acquire title under the mining laws to the land included in Mr. Quick's leases. A day earlier, September 17, 1952, the mining claimants filed application to contest No. 57 against oil and gas leases Colorado 0809, 01156, and 01834, issued on May 1 and June 1, 1951, to General Petroleum Corporation, D. E. Sanburg, and William T. Schwartz, and against oil and gas lease application Colorado 01157 filed by Mary Elaine Smith, asserting that the leases and application included lands covered by the Sid placers, possessory title to which was in the mining claimants. The contestees denied the charges in the notices of contest, requested a hearing, and the two contests were combined in one hearing on January 27, 1953, at Denver before the manager of the Colorado land and survey office.

If, at the hearing, the contestants showed that they were entitled to the possession of mining claims which are valid either by reason of discovery before February 25, 1920, the date of the enactment of the Mineral Leasing Act, or by reason of section 37 of the act, which excepted from its provisions "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery,"¹ and showed also that the claims were excepted from the withdrawal order of June 9, 1930, the Department would not be authorized to issue oil and gas leases on the land covered by such claims.

In support of the contest, the contestants submitted certified photostatic copies of location certificates as recorded in the recorder's office

¹ The Department has held that under the Mineral Leasing Act only such oil placer claims as were validated by discovery prior to the date of the act or upon which discovery was made thereafter as a result of diligent prosecution of work in progress on that date and thereafter continued until discovery, can be considered as valid claims. *Susie E. Cochran et al. v. Effie Bonebrake*, 57 I. D. 105 (1940); *Minerva L. Jones Starks v. Frank P. Mackey*, 60 I. D. 309 (1949).

The test as to whether a valuable discovery of mineral has been made is whether mineral deposits have been found which would justify a man of ordinary prudence in the expenditure of his time and money to develop the property. *Chrisman v. Miller*, 197 U. S. 313, 322, 323 (1905).

at Meeker, Rio Blanco County, Colorado.² The notices, recorded on August 3, 1918, state that each of the claims was located on July 5, 1918, and that each was located "for petroleum and other mineral oils and chiefly valuable therefor." Certified copies of deeds purporting to show transfer to the contestants of title to the mining claims were introduced into evidence at the hearing (pp. 5-15; contestants' exhibits "B" through "L"). An affidavit of April 8, 1921, by Charles B. Cramer, one of the original locators, is recorded in the county records at Meeker and was submitted in behalf of the contestants. This affidavit states that the claims were properly located, surveyed, and monumented and that the notices of such location were posted at the proper places; that the location work required by the Federal statutes was performed; and that the claims were "located by virtue of their own discovery and in recognition of the probable merit of the same as a mining or industrial enterprise" (pp. 21-23; contestants' exhibit "O"). The contestants also submitted an affidavit of April 11, 1921, by Sidney A. Parker, stating that he was employed as a transit man in surveying and monumenting these claims; that he had no interest in the location or ownership of the claims; and that of his own knowledge all of the work done was in compliance with the Federal statutes governing the same (p. 24; contestants' exhibit "O").

Counsel for the contestees objected at the hearing on a number of grounds to most of the documents which were introduced for the contestants (pp. 5-36) and moved for a dismissal of both contest proceedings for nine reasons, only two of which will be mentioned here (pp. 38-46). These are, first, that the contestants failed to show a valid discovery because a recital in a location notice or in a validating certificate that a valuable discovery has been made by the locator is not evidence of a discovery; and, secondly, that it would be impossible from the descriptions given in the recorded notices of location to locate the claims on the ground. In connection with the latter objection, counsel for the contestees asked the manager to take judicial notice of the fact that the township in which the claims are situated was not surveyed in 1918. (Pp. 5, 38-39, 41, 46.)

In a decision of August 27, 1953, the manager held that a mining claimant who contests the filing of an oil and gas lease application on land covered by a mining claim has the burden of showing, as a minimum, that a valid location has been made on the area of the

² Transcript of hearing, January 27, 1953, at Denver on Contest Nos. 56 and 57, pp. 4-5; contestants' exhibits A-1 through A-6. Page references hereafter, unless otherwise noted, refer to the transcript of the hearing on these contests.

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claim; that as the evidence submitted by the contestants does not constitute such showing, they did not establish a right to possession of the land superior to the right of the United States to issue oil and gas leases on the land. The Director of the Bureau affirmed the manager's decision and held further that the claims were invalid because the contestants had failed to meet the burden of proof required to substantiate a valid location. On appeal to the Secretary, the contestants have requested a rehearing in order to present additional evidence of discovery of oil shale on the claims.

An examination of the record on this appeal and of the plat of survey of the township where the land involved is located discloses that because of defective descriptions of the land embraced within the mining claims, the applications to contest should have been rejected, pending correction of the descriptions, or that the contests should have been dismissed without prejudice to the right of the contestants to file applications to contest with descriptions which identify the land included in the Sid claims.

Each of the mining claims covers 160 acres. The recorded certificates of location describe the land by legal subdivisions only and contain no other description of the land. T. 2 S., R. 95 W., the township in which the land here involved is located was not surveyed until 1924 and the plat of survey was accepted January 6, 1925. The oil and gas leases and application describe the lands applied for by legal subdivisions in conformity with the 1924 survey. The descriptions in the location certificates of 1918 by legal subdivisions seem to show that the contestees' oil and gas leases and application include some of the land which is embraced within the mining claims. However, because the township was not surveyed in 1918, and because the land descriptions in the location certificates by legal subdivisions could not have accurately described the land in accordance with the 1924 survey, the actual extent of conflict, if any, between the mining claims and the leases and application cannot be determined until the description of the claims is adjusted to the 1924 survey.

The conclusion that the land descriptions in the location certificates could not have accurately described the land by legal subdivisions established by the 1924 survey results from the fact that common corners of adjoining surveyed townships were not projected in establishing corners for the survey of T. 2 S., R. 95 W. The affidavit of April 18, 1921, by Charles B. Cramer indicates that the land descriptions in the location certificates were based on projections of sub-

dividing lines of an adjoining township which had been surveyed before 1918.³ Plats of survey of T. 2 S., R. 95 W., and of the townships which adjoin it show that most of the corners of the survey of T. 2 S., R. 95 W., are not projections of corners of surveyed townships adjoining it. Thus, land in T. 2 S., R. 95 W., which was described in 1918 by legal subdivisions as they would have been if survey of the township had been based on projections of subdividing lines of the adjoining surveyed townships, is not correctly described in terms of the actual survey of T. 2 S., R. 95 W., and an adjustment of description of the mining claims to conform to the survey of T. 2. S., R. 95 W., is required.

Inasmuch as the location certificates do not describe the mining claims by legal subdivisions which conform with the survey or by metes and bounds, it is impossible to know to what extent the claims conflict with the oil and gas leases and application held by the contestees. Some of the claims may not conflict at all with the leases and application. Since the applications and notices of contest contain the same description of the mining claims as the certificates of location, it is apparent that the contest papers did not properly identify the land involved. The Department has held that a misdescription of land in an application to contest is fatally defective, although ordinarily a contestant is permitted to amend his application. *Roark v. Tarkington, McCracken, Intervener*, 51 L. D. 183 (1925). Accordingly, the motion to dismiss the contests could have been allowed on this basis alone.

However, the fact is that the motion to dismiss was not made until after the contestants had completed the presentation of their case (pp. 37, 38). It is therefore proper to examine the record to see whether the contestants established whether they had any valid claims, whatever ground such claims may have covered. Discovery, of course, is an absolute prerequisite for a valid mining claim. *Cole v. Ralph*, 252 U. S. 286, 295 (1920). The contestants submitted no testimony as to discovery, no assay certificates, nor any other evidence that a mineral deposit or deposits had been uncovered on any of the claims. The contestants relied solely on the documents introduced into evidence, namely, the certificates of location, affidavits of annual assessment

³ The affidavit states in relevant part that the claims are situated "all in Township 2 South Range 95 West of the 6th Principal Meridian, the same being an unsurveyed Township, except as subdivided by individual survey, based upon corners established in the surveyed Township adjoining and that the boundary lines of the several claims would correspond to the above subdivisions if the said Township were under an approved survey; all of which is situated in Rio Blanco County, Colorado * * *."

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work, notices of intention to hold the claims in years when assessment work was not required, and the affidavits of Charles B. Cramer and Sidney A. Parker mentioned earlier. Recitals of discovery in notices of location are mere *ex parte*, self-serving declarations on the part of the locators and are not evidence of discovery. *Cole v. Ralph, ibid.*, p. 303. As to the affidavits of annual assessment work, they merely recite that so much worth of "improvements" was performed on the claims. This is far from an assertion of discovery, and in any event assessment work cannot take the place of a discovery. *Cole v. Ralph, ibid.*, p. 296. The notices of intention to hold the claims in years when assessment work was not required are completely valueless, saying nothing at all about anything done on the claims. As for the affidavits of Cramer and Parker, the latter merely stated that he was a transit man engaged in locating and surveying the claims. Cramer stated only that the claims were located "by virtue of their own discovery." As he was one of the original locators, his statement is comparable to the recital in a notice of location and has no more effect. *Minerva L. Jones Starks v. Frank P. Mackey, supra*, fn. 1.

It is clear from this that the contestants completely failed to show a discovery on any of the 22 claims at issue and consequently failed to show that any of the claims was valid. The burden of proof was on the contestants to establish the validity of their claims. *United States v. Ruddock*, 52 L. D. 313 (1927); *Minerva L. Jones Starks v. Frank P. Mackey, supra*. Having failed to sustain their burden, they must suffer the dismissal of their contests and the invalidation of their claims. *Monolith Portland Cement Company et al.*, 61 I. D. 43, 50 (1952); *Ohio Oil Company et al. v. W. F. Kissinger et al.*, 60 I. D. 342 (1949).

On their present appeal, the contestants have filed a motion for rehearing in order to permit them to submit additional evidence on the issue of discovery. They state that since the filing of their brief on appeal—which was received on April 2, 1956—the claims have been examined and that

This examination disclosed on the ground encompassed by the claims, discovery work of ancient character, indicating extensive exploration work upon the claims and establishing that there was upon the claims a mineral discovery consisting of the oil shale. The examination of these claims done during the week of April 2, 1956, disclosed on the ground one drift 75 feet deep, 4 feet high, and 5 feet wide, as well as a second drift about 70 feet deep, 4 feet high and 5 feet wide, as well as other small cuts approximately 20 feet long and 10 feet deep. There are upon the claims numerous exposures and outcroppings of oil shale and several dumps made up of oil shale material mined from the claims. In addition, there is a shaft approximately 25 feet deep and approximately 15 feet

across. The vegetation in and about these drifts, shaft and exposures, consisting of trees, bushes and shrubs, have grown upon and in and about these workings, establishing that this work was done a great many years ago. Samples were also taken from these various drifts and shaft and exposures, the analysis of which showed oil shale, establishing mineral discovery upon these lands.

At the time the appeal was filed, 43 CFR 221.67 provided as follows:

Sec. 221.67 *When additional evidence will be considered.* No additional evidence will be admitted or considered by the Director unless offered under stipulation of the parties or in support of a mineral application or protest: *Provided, however,* That the Director may order further investigation made or evidence submitted upon particular matters to be by him specifically designated.

Affidavits or other ex parte statements filed in the office of the Director will not be considered in finally determining any controversy upon the merits.⁴

43 CFR 221.78 provided at that time that, in proceedings before the Secretary, the same rules should govern, insofar as applicable, as were provided for proceedings before the Director of the Bureau of Land Management.

Under the rule quoted the Department for many years has allowed additional evidence to be submitted after a hearing in a private contest case was closed, either by reopening the hearing or by further hearing unless it appeared from the record, with reasonable clearness, that the petitioner had no substantial claim to equitable consideration. See *Riley v. Ford*, 1 Copps *Public Land Laws* (1882 ed.) 228 (1876); *Horn v. Burnett*, 9 L. D. 252 (1889); *Gibson v. Van Gilder*, 9 L. D. 626 (1889); *Piper v. State of Wyoming*, 15 L. D. 93 (1892).

What are the circumstances here which should be considered to determine whether the contestants should be allowed a further hearing? As stated earlier, the Sid claims were located on July 5, 1918. In 1921, as the result of complaints that assessment work had not been performed on the claims, a field investigation of the claims was made. The examiner found that the 22 Sid claims were part of a total of 115 claims totaling 18,400 acres located by eight individuals in a period of 19 days, July 5 to 24, 1918. The examiner on October 20, 1921, examined some 14 cuts on the Sid claims dug in soil and loose rock, estimating the cost at \$1 to \$5 per cut. The cuts ranged in size from 2½ to 4 feet in width and 6 to 15 feet in length, and had faces ranging from 6 to 11 feet.

As a result of the field report, adverse proceedings against the claims were ordered on June 11, 1924, the charge being that the required

⁴The rules of practice were completely revised after this appeal was filed (21 F. R. 1860). 43 CFR 221.77 of the revised rules permits the Director, after an appeal has been taken to him in a contest case, to remand the case for a further hearing if he considers it necessary to develop the facts.

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annual assessment work on the claims had not been performed for 1920 and 1921. Service was made on E. B. McNair and George W. Habbersett, the then owners of the claims. An answer was filed by McNair, but neither appeared at the hearing. On October 5, 1925, the register of the land office at Glenwood Springs, Colorado, granted the Government's motion for judgment by default. This decision was affirmed on January 11, 1927, by the Commissioner of the General Land Office who declared the claims null and void.

On July 16, 1930, new adverse proceedings against the claims were ordered on the ground that the charge in the first proceeding did not contain sufficient facts. Again McNair and Habbersett were served. Only McNair answered but his answer was held insufficient and he was required to file a proper answer. Upon his failure to do so and Habbersett's failure to answer at all, the claims were held void as to them on October 12, 1931, and January 7, 1932.

Subsequently, as the result of the Supreme Court's decision in the case of *Ickes v. Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935), holding that the Secretary of the Interior had no authority to void a mining claim for failure of assessment work, the Department apparently considered the proceedings against the Sid claims to be vitiated. See *The Shale Oil Company*, 55 I. D. 287 (1935). No other proceedings involving the claims appear to have been taken until the present contests were initiated.

This history of the claims is not recited for the purpose of showing or indicating that the claims are void for lack of discovery. Indeed, the prior proceedings did not involve the question of discovery but only of lack of assessment work. Nevertheless, for the purpose of determining whether in the exercise of discretion a further hearing should be granted the contestants, inferences from the past history of the claims may properly be utilized along with other facts. The claims are now over 38 years old. They were located with 93 other claims by the same locators in a remarkably brief span of time, 19 days. In 1921 there apparently existed only 14 shallow cuts for the 22 claims. Twice thereafter, in 1924 and 1930 adverse proceedings were ordered against the claims. One of the owners, George W. Habbersett, never answered, although served. The other owner, McNair, answered but did not appear at the first hearing; he failed to file a proper answer in the second proceeding. Thereafter, although the claims were declared null and void, the mining claimants did nothing until 1952 when they filed the present contests. Yet, although the hearing was held on January 27, 1953, they apparently made no move to even look

at the ground on which the claims are located until April 1956, three years after the hearing and after the manager and the Director rendered their decisions. This same evidence was available long before the contestants even initiated their contests.

Meanwhile, three of the leases held by the contestees (Colorado 0809, 01156, 01834) have seen the end of their primary terms on May 1 and June 1, 1956.⁵ The other three leases (Colorado 04574, 04575, 04576) will expire on July 1, August 1, and September 1, 1957. The present proceedings have consumed around 4 years of the 5-year terms of the leases. If another hearing is ordered, it is conceivable that another 2 years would elapse before a final decision would be rendered.

In these circumstances, and particularly in view of the fact that the contestants were given a full and complete opportunity to present whatever evidence they desired at the hearing held on January 27, 1953, the Department sees no justification for giving the contestants at this late date another opportunity for a hearing to present evidence which was clearly available to them but for their laches.

As the contestants completely failed to show a discovery on any of their claims, whatever ground may actually be covered by their claims, their contests were properly dismissed and their claims properly declared invalid.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

⁵ Presumably the lessees have filed applications for 5-year extensions pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 226), since they have not withdrawn from the case.

APPEAL OF BENNETT INDUSTRIES, INC.

IBCA-102

*Decided April 23, 1957**

Contracts: Appeals—Rules of Practice: Appeals: Timely Filing

Under a Government contract which provides for the taking of an appeal within 30 days, but does not specify with particularity either the event that starts or the event that stops the running of this period, the time for appeal begins to run when the contractor actually receives its copy of the decision of the contracting officer, and an appeal that is not mailed by the contractor until more than 30 days after the receipt of such copy is not timely and must be dismissed for lack of jurisdiction.

BOARD OF CONTRACT APPEALS

Bennett Industries, Inc., Peotone, Illinois, has appealed from the findings of fact and decision of the contracting officer dated December 10, 1956, denying its request for an extension of time for performance under Contract No. 14-06-D-1642, entered into on December 9, 1955, with the Bureau of Reclamation.

The contract, which is on U. S. Standard Form 33 (Nov. 1949 Edition) and incorporates the General Provisions of U. S. Standard Form 32 (Nov. 1949 Edition), provided for the furnishing and delivering of one fixed-wheel gate frame for the outlet works at Lovewell Dam, Bostwick Division, Nebraska-Kansas, Missouri River Basin Project, in accordance with Invitation No. DS-4534.

The contract required that the contractor make complete shipment of the gate frame from Peotone, Illinois, within 90 calendar days after date of receipt of award of contract or be charged with liquidated damages at the rate of \$10 per day for each day of delay in making shipment thereof,¹ except for delays due to excusable causes as defined in the contract.² The contractor received notice of award of contract on December 12, 1955, thus establishing the date for complete shipment as March 11, 1956. Complete shipment, however, was made on April 28, 1956, or 48 calendar days after the date fixed therefor.

In his findings of fact the contracting officer concluded that shipment was delayed 20 calendar days because of delay in procurement and delivery of certain items of stainless steel, and 28 calendar days because of a mistake in dimensioning made by the contractor and delay in machining. He held that such delays were not due to excusable causes within the meaning of the contract terms and, accordingly, denied any extension of time.

*Not released for publication in time for inclusion chronologically.

¹ Bidding Schedule, item 1, and Special Conditions, paragraph B-6.

² Special Conditions, paragraphs A-9 and B-6.

Department Counsel has submitted a motion, dated February 8, 1957, to dismiss the appeal for lack of jurisdiction on the ground that it was not filed within the time prescribed by the contract.

The time for filing such an appeal as the present one is governed by paragraph B-6 of the Special Conditions of the contract, which deals with the assessment of liquidated damages for delay, and provides for extensions of time that will relieve the contractor from liability for such damages.³ Paragraph B-6 fixes 30 days as the period of time within which an appeal may be taken from a decision of a contracting officer denying such an extension, but does not specify with particularity either the event that starts or the event that stops the running of this period.⁴ The interpretation of this paragraph which seems to be best justified and should be followed is that the time for appeal begins to run at the time when the contractor actually receives its copy of the decision of the contracting officer,⁵ rather than at the time when the decision is made or at the time when the copy is mailed to the contractor, and that the running of the time is stopped when the notice of appeal is actually mailed by the contractor,⁶ rather than when the notice is received by the contracting officer or by the reviewing authority.⁷ However, as will be seen, the present appeal was not taken within the prescribed 30 days even if computed in accordance with the foregoing interpretation and, *a fortiori*, was not taken within the prescribed 30 days if computed in accordance with any less liberal interpretation.

The findings of fact of the contracting officer are dated December 10, 1956. Their concluding paragraph invited the attention of

³ The instant contract contains three separate provisions authorizing appeals from decisions of the contracting officer. The first—paragraph A-10 of the Special Conditions—applies to all decisions upon questions of fact “except as otherwise provided in this contract.” The second—paragraph A-9 of the Special Conditions—applies to findings of fact upon requests for extensions of time that involve relief from liability for excess costs in the event the contract is terminated for default. The third—paragraph B-6 of the Special Conditions—applies to findings of fact upon requests for extensions of time that involve relief from liability for liquidated damages, the situation here involved. The portion of paragraph B-6 that deals with appeals reads as follows:

“* * * The contracting officer shall then ascertain the facts and extent of the delay and extend the time for making shipment when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for making shipment shall be final and conclusive on the parties hereto to the extent provided in Paragraph A-10 of this invitation.”

“In these respects the terminology of paragraph B-6 differs from the language of the general “disputes” clause of the contract—paragraph A-10 of the Special Conditions—which expressly states that the 30 days allowed for appeal run from the date on which the contractor receives a written copy of the contracting officer’s decision, and that the appeal shall be mailed or otherwise furnished to the contracting officer within said 30 days.

⁴ See *Bendix Chemical Corporation*, ASBCA No. 719 (January 31, 1951).

⁵ *Chrysler Corporation*, BCA Nos. 39, 47, 48, 73 and 79, 1 CCF 162, 166 (1943); *Brown Construction Company*, BCA No. 1046, 3 CCF 946, 949 (1945).

⁷ Under this interpretation, the time provisions of paragraph B-6 would have the same effect as those of paragraph A-10.

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the contractor "to the right of appeal within 30 days," explained the appeal procedure, and stated that a copy of the regulations prescribing the functions and rules of procedure of the Board was attached. The contractor received a copy of the findings of fact on December 15, 1956, a date which is established by the contractor's own statements in its notice of appeal and in its letter transmitting the notice to the contracting officer. Computing the time from December 15, 1956, the last day of the 30-day period was January 14, 1957, a day which was neither a Sunday nor a legal holiday. The notice of appeal is dated January 15, 1957, and the letter transmitting it to the office of the contracting officer is dated January 16, 1957. The contractor's general office was in Peotone, Illinois; the contracting officer's office was in Denver, Colorado; and the letter of transmittal has endorsed on it a date stamp indicating that it was received on January 17, 1957. There is no evidence to suggest that the notice of appeal was mailed prior to the date borne by it, that is January 15, 1957. In the light of these circumstances, the Board finds that the notice of appeal was not mailed within 30 days from the date when the contractor first received a copy of the contracting officer's decision.

The Board concludes, therefore, that the appeal was not taken within the period prescribed by paragraph B-6 of the contract. It is well established that provisions of the nature of those contained in paragraph B-6 are jurisdictional, and preclude review of the contracting officer's decisions upon questions of fact arising under the contract unless an appeal is taken within the 30 days allowed for that purpose. Neither the Board nor any administrative officer has authority to waive this limitation or otherwise extend the 30-day period of time.⁸

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the motion to dismiss is granted, and the appeal from the decision of the contracting officer is dismissed for lack of jurisdiction.

HERBERT J. SLAUGHTER, *Member*.

We concur:

THEODORE H. HAAS, *Chairman*.

WILLIAM SEAGLE, *Member*.

⁸ 43 CFR 4.5, 4.16; *Poloron Products, Inc. v. United States*, 126 Ct. Cl. 816, 824-826 (1953); *Wiscombe Painting Company*, IBCA-78 (October 26, 1956); *Emsco Manufacturing Company*, 63 I. D. 92 (1956); *Bibb Construction Co.*, ASBCA No. 3457, 56-2 BCA, par. 1052 (1956); *Tetyak-Young Construction Company*, ASBCA No. 2971, 56-2 BCA, par. 1053 (1956); *Schroeder Tool & Engineering, Inc.*, ASBCA No. 851 (February 5, 1952).

ALBERT H. DOBRY
GEORGE H. BOROVAY

A-27387

*Decided May 8, 1957***Small Tract Act: Sales**

The departmental regulation governing applications to purchase under small tract leases carrying an option to purchase is not mandatory, but only directory, as to the time when an application to purchase is to be filed.

Small Tract Act: Sales

The departmental regulation governing applications to purchase under small tract leases where improvements are made does not apply to applications to purchase which are permitted by administrative action to be made without the construction of improvements.

Small Tract Act: Sales

Where the holder of a small tract lease is given an option to purchase the land without making improvements and no time limit is expressed within which he must file his application, he may file his application within a reasonable time after the term of his lease has expired.

Small Tract Act: Applications—Agency—Applications and Entries: Filing

Where applicants to purchase land under a small tract lease deposited the application and purchase money in escrow with a bank and directed the bank to file the application within a certain time and the bank delayed the filing beyond the time specified, the applicants must suffer whatever consequences result from the action of their agent.

Small Tract Act: Sales

An application to purchase under a small tract lease, without making improvements, which is filed 25 days after the expiration of the lease term is not unreasonably late where no action has been taken to open the land to other filings and no intervening rights have attached to the land.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On April 1, 1952, a small tract lease (Nevada 04263) was issued on lot 16, sec. 3, T. 21 S., R. 60 E., M. D. M., Nevada, to Albert H. Dobry and George H. Borovay under the terms of the Small Tract Act of June 1, 1938, as amended (43 U. S. C., 1952 ed., sec. 682a), for a period of 3 years. The lease therefore expired on March 31, 1955.

Under the terms of the lease the lessee agreed to construct upon the land to the satisfaction of the Regional Administrator, "substantial improvements appropriate for the use for which the lease is issued." The land was classified for "homesite only" and the lessees stated in their application that they would place on the land a "home and a well."

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On September 10, 1954, the manager of the Reno, Nevada, land office informed Mr. Borovay that if he desired to purchase the land embraced in the lease prior to the construction of improvements thereon, he should sign and return the notice of election to amend his lease sent to him, together with remittance of \$1,427.25, within 6 months of receipt of the notice (on or before March 10, 1955). The notice gave Mr. Borovay the choice of electing to do this (Option No. 2) or of proceeding to purchase the land under the provisions of his lease (Option No. 1), which required the construction of improvements on the lease.

On April 25, 1955, 25 days after the expiration of the lease, an election to amend the lease pursuant to an Option No. 4, together with a cashier's check of the First National Bank of Nevada in the amount of \$850, was filed in the Reno land office by the bank for the lessees.

In a decision dated December 20, 1955, the application to purchase was rejected by the land office manager for the reason that it was not filed during the term of the lease. Dobry and Borovay appealed to the Director, Bureau of Land Management, from this decision, and on June 13, 1956, the Director affirmed the manager's decision. From the Director's decision, the applicants have appealed to the Secretary of the Interior.

The appellants seek to explain the fact that the application to purchase was not filed during the term of their lease by stating that on February 17, 1955, they deposited in escrow certain funds, together with the written form sent them by the manager, with the First National Bank of Nevada Trust Department, and instructed the bank that the funds and the application were required to be deposited before April 1, 1955, with the land office in Reno; and that the bank did not deliver the money or file the application until April 25, 1955. The appellants contend that they have, in good faith, done everything possible to comply with the Government's requirements and ask that the Secretary of the Interior, in the exercise of his equitable powers, relieve them from "the unusual and peculiar circumstances."

At the time when the appellants' lease was issued, the pertinent small tract regulation (43 CFR, 1953 Supp., 257.13) provided that land would not be sold directly under the Small Tract Act but only on the basis of a lease carrying an option to purchase clause. This option gave the lessee an opportunity to purchase the land 1 year

after the lease was issued provided the improvements required by the lease were made. The regulation then provided:

(b) An application to purchase should be filed with the manager in duplicate on Form 4-775a during the term of the lease but not more than 30 days prior to the expiration of one year from the date of lease issuance, together with a statement as to the cost, type, and character of the improvements constructed on the land.

The appellants' lease specifically incorporated the requirements of the regulation.

The regulation remained unchanged until January 10, 1955, when all the small tract regulations (43 CFR, Part 257) were completely revised, effective 60 days thereafter (March 11, 1955). The revised regulations authorized the direct sale of tracts under the Small Tract Act, but section 257.13 continued to provide as follows:

(a) Leases for lands classified for lease and sale will contain an option to purchase clause. The option to purchase clause will afford the lessee * * * an opportunity to purchase the tract at any time within the term of the lease, provided the improvements required by the lease have been made * * *.

(b) An application to purchase must be filed with the office mentioned in § 257.6 (a) on Form 4-775a in duplicate, together with (1) a statement as to the cost, type and character of the improvements constructed on the land, (2) one or more photographs showing clearly such improvements, and (3) the filing fee as required in § 257.8. [43 CFR, 1955 Supp. § 257.13.]

It will be noted that this amendment of the regulation became effective approximately 3 weeks before the appellants' lease expired. It will be noted too that the amended regulation says nothing about a right to purchase land without making the required improvements. In other words nothing in the regulations in effect during the term of the appellants' lease said anything about options to purchase the leased land without making improvements. To understand the situation applicable to the appellants' lease it is necessary to turn elsewhere.

The Department's files disclose that on March 22, 1954, in a memorandum to the Assistant Secretary for Public Land Management, the Director of the Bureau of Land Management pointed out the inability of small tract lessees in Clark County, Nevada (where the appellants' leased land is situated), to finance acceptable improvements prior to securing title to their tracts. The Director therefore recommended that lessees be offered the option to purchase, "within a reasonable period of time after notice," on the basis of a market value reappraisal in lieu of the improvement requirement in their leases. The recommendation was approved on March 26, 1954, by former Assistant Secretary Lewis.

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This action was cited by the manager in the form notice dated September 10, 1954, which he sent to Mr. Borovay, offering him his choice of Option No. 1 (to continue under the improvement requirement) or Option No. 2 (to purchase at \$1,427.25 without making improvements). As stated earlier, Mr. Borovay's time to elect which option to take was limited to 6 months, or until March 10, 1955, which was about 3 weeks before his lease would expire.

Meanwhile, on July 15, 1954, the Acting Director of the Bureau of Land Management, in a memorandum to Assistant Secretary Lewis, stated that from time to time the improvement requirement of the regulations had been waived in certain areas, that a revision of the small tract regulations was being completed which would provide for direct sales of small tracts, that this would not help current lessees, and that, therefore, the Bureau would like authority to waive the improvement requirement in all areas where such action seemed desirable. This was approved on August 9, 1954, by Assistant Secretary Lewis.

Thereafter, the Bureau experienced difficulties in connection with the reappraisal of small tracts. Finally, in a memorandum dated February 2, 1955, approved by Assistant Secretary Lewis on February 1, 1955 [sic], the Director issued a memorandum to all area administrators and State supervisors informing them that four alternative courses had been adopted whereby a lessee could purchase his tract.

Apparently as a result of this memorandum, the Nevada State supervisor prepared a form notice which informed small tract lessees that they could acquire title to their tracts by exercising one of four options. The four options corresponded to the four alternatives set forth in the memorandum of February 2, 1955. The records of the Reno land office show that a copy of the notice, together with a form on which the election of options was to be indicated, was mailed to the appellants on December 28, 1954.¹ As stated earlier, the form with an election of Option No. 4 indicated thereon was returned on April 25, 1955, 25 days after the expiration of the lease term.

With this background in mind, we turn to the reasons given for rejecting the application to purchase as being late. Both the manager and the Director interpreted 43 CFR 257.13 (as amended on January 10, 1955) as imposing a mandatory requirement that an application to purchase be filed before the end of the lease term.

¹ This date is erroneous or else the State supervisor received advance notice of the alternatives later set forth in the memorandum of February 2, 1955.

This was based on the provision of the regulation that the option to purchase clause will afford the lessee "an opportunity to purchase the tract at any time within the term of the lease." Although this language is capable of a mandatory interpretation, it falls considerably short of the language which one would think would be used in imposing a peremptory duty upon a lessee who desires to purchase.

Further doubt is cast upon the interpretation of the regulation as mandatory when the regulation is examined in context with the regulation governing renewals of small tract leases. Prior to its amendment on January 10, 1955, section 257.13 provided in pertinent part as follows:

(a) * * * The option to purchase * * * will afford the lessee * * * an opportunity to purchase the tract at or after the expiration of one year from the date the lease issued * * *.

(b) An application to purchase *should* be filed with the manager in duplicate on Form 4-775a *during the term of the lease* * * *. [Italics added.]

Concurrently, section 257.14 provided in part as follows:

(a) An offer for the renewal of a lease *must* be filed not more than six months or less than 60 days *prior to the expiration of the lease* * * *. [Italics added.]

The use of "should" in the first regulation and "must" in the immediately following regulation strongly suggests a difference of intent with respect to the force of the two regulations. "Must" clearly has a mandatory import; "should" does not. A few years ago, when the Department was required to construe a regulation providing that an application to renew an oil and gas lease "should be filed * * * prior to the expiration of its term" (43 CFR 192.61), the Department held that "should" was not mandatory but directory. *Melvin N. Armstrong et al.*, A-26474 (August 22, 1952); *Oscar L. Butcher et al.*, 61 I. D. 120 (1953). There is no sound basis for distinguishing between the oil and gas regulation and section 257.13 (b).

After the revision of the small tract regulations on January 10, 1955, section 257.13 read in pertinent part as follows:

(a) * * * The option to purchase clause will afford the lessee * * * an opportunity to purchase the tract at any time within the term of the lease * * *.

(b) An application to purchase *must* be filed with the office mentioned in § 257.6 (a) on Form 4-775a in duplicate * * *. [Italics added.]

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Section 257.14 was renumbered 257.15 and now reads as follows:

(a) An application for renewal of a lease must be filed on Form 4-775a in duplicate with the office mentioned in 257.6 (a) prior to the expiration of the lease. * * *

It will be noticed that "should" was changed to "must" in section 257.13 (b). However, the phrase "during the term of the lease" was dropped. As it now stands, paragraph (b) merely states that an application to purchase must be filed in a certain office and on a particular form. There is no time limitation. The time limitation was shifted from paragraph (b) to paragraph (a), but there it is not coupled with any peremptory language requiring that it be given a mandatory construction. The contrary interpretation is strongly indicated when the equivocal language in section 257.13 is viewed in contrast to the plain positive language of section 257.15.

Even if section 257.13 were construed as mandatory, the question is presented whether the regulation applies at all in this case. 43 CFR 257.13 refers in terms only to the purchase of tracts on which the improvements required by the leases have been made. This is especially evident in paragraph (b) of the amended regulation which makes it mandatory that the application be filed on Form 4-775a with a statement as to the cost, type, and character of the improvements and one or more photographs of the improvements. Nowhere in the regulation is there any reference to options to purchase without making improvements. In the circumstances it is far from clear that options to purchase without making improvements are governed by the regulation. It will be recalled that when the manager first notified Mr. Borovay on September 10, 1954, of his right to choose between two options, he gave Mr. Borovay 6 months in which to elect, the 6 months expiring a few weeks before the end of the lease term. If the regulation were controlling, there was no basis for requiring Mr. Borovay to act before the expiration of his lease.

In the notice later sent to the appellants informing them of the four options, there was no statement that the exercise of the options not requiring improvements was to be governed by section 257.13. The notice stated in part:

If you wish to exercise Option No. 4, fill out and sign *attached request* for amendment of your lease and remit full payment in accordance with schedule specified under Option No. 4 above.

* * * * *

All options *may* be exercised at any time prior to the expiration of your lease. However, it is important that you exercise one of the options as far in advance of the expiration of your lease as possible because lease renewals

will not be granted except in those instances where non-renewal would work an extreme hardship on the lessee. [Italics added.]

In the first paragraph quoted, the lessee was told to fill out and sign the "attached request." The attached request was not Form 4-775a, which section 257.13 (b) requires an applicant to purchase to file in duplicate, but was a new form devised at the local level, only one copy of which form was required to be filed. As for the second paragraph quoted, the use of the word "may" hardly comported with any language in section 257.13 that might be deemed to be mandatory. In other words, the form of notice used and the procedure followed in connection with the exercise of options to purchase without making improvements was at such variance with section 257.13, as amended, that it would be wholly unreasonable to hold that that regulation governed the exercise of the options.² I conclude, therefore, that section 257.13, as amended, does not govern the exercise of options to purchase without making improvements.

It follows that there was no clear cut requirement either by regulation or notice that the appellants had to file their application to purchase before the end of their lease term or suffer the rejection of their application. This does not mean, of course, that there was no limitation as to when the appellants were required to file their application. Obviously they could not wait indefinitely after the expiration of the lease term to indicate their desire to purchase. Further disposition of the land would be held up indefinitely and the status of the land would be rendered uncertain. It seems clear, therefore, that an application to purchase must be filed within a reasonable time after the expiration of the lease term. What constitutes a reasonable time necessarily depends upon the facts and circumstances of each case.

The appellants have consistently maintained that some time in February 1955³ they deposited \$850 in escrow in the First National Bank of Nevada, together with the executed form electing to exercise Option No. 4, and instructed the bank to pay the money and file the form in the Reno land office before April 1, 1955. They claim that through the fault of the bank the filing was late.

It is, of course, elementary that the bank was the agent of the appellants and that they are chargeable with whatever consequences resulted from the negligence of the bank. The question now is whether, in the circumstances of the case, the filing of the application

² It is perhaps of some significance that in his memorandum of July 15, 1954, requesting general authority to waive the improvement requirement, the Acting Director stated: "The proposed [revision of the small tract] regulations, however, will make no provision for current lessees of small tracts to acquire their small tracts without first improving them according to the terms of their respective leases."

³ Various dates have been given by the appellants: February 7, 16, and 17.

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to purchase 25 days late should be deemed so unreasonably late as to warrant the rejection of the application.⁴ In two cases in which the Department "waived" the late filing of applications to purchase, one application was 5 days late and the other was 62 days late.⁵ The appellants' application falls approximately halfway between those two applications in point of lateness of filing. It is true that in the two "waiver" cases the applicants had constructed improvements on their tracts whereas the appellants have not. Nonetheless, from the standpoint of time only, the appellants' application comes well within the limits of what the Department has considered to be an excusable delay.

At the time when the appellants' lease expired, section 257.18 of the revised small tract regulations provided that when a small tract lease has terminated, been relinquished or canceled for any reason, the land shall not be subject to further application until an order is issued specifying the time and manner in which the tract shall be made available for lease or purchase. The case record shows that on September 13, 1955, the manager issued a form notice to Mr. Borovay that his lease had "expired by due process of law, and is therefore cancelled and closed on our records as of this date." In a subsequent letter to the appellants' attorney, dated December 30, 1955, the manager informed him that no other filings had been made for the land. It is clear therefore that at the time when the appellants' application to purchase was filed, the land office had taken no action to open the land to other filings and no other filings had been made or intervening rights had attached.

Viewing these factors in the circumstances of this case, particularly in light of the absence of any definite notice given to the appellants as to when they must or should file their application to purchase, I am unable to conclude that the application was filed unreasonably late.

Therefore, the Director's decision is reversed and the case is remanded to the Bureau of Land Management for further action on the application to purchase in accordance with the decision.

HATFIELD CHILSON,
Under Secretary.

⁴ In holding that the appellants are bound by the late filing of the application, it becomes unnecessary to determine the significance of the date "4/13/55" written on the notice of election apparently by Mr. Borovay. Even if the appellants had not in fact deposited the notice and payment in escrow in the bank until on or after April 13, 1955, the crucial date to be considered in determining whether the application to purchase was filed unreasonably late is still April 25, 1955.

⁵ Decision of Director, Bureau of Land Management, approved on April 26, 1956, by former Assistant Secretary D'Ewart, involving small tract lease New Mexico 04098; decision of Acting Director, approved on July 27, 1956, by former Assistant Secretary D'Ewart, involving Anchorage 021924.

OIL AND GAS LEASES—SIMULTANEOUS FILINGS

Applications and Entries: Priority—Regulations: Generally

Where the regulations define "filed simultaneously" with respect to conflicting applications or offers as "filed at the same time," offers filed 1 or 10 seconds apart are not simultaneous filings, but the first offer received is filed prior to the next one.

Oil and Gas Leases: First Qualified Applicant

The provision of section 17 of the Mineral Leasing Act as amended, giving priority to the first qualified applicant, coupled with the definition of simultaneous filings contained in the regulations and with the long-continued practice of the Department, requires that an oil and gas lease offer received over the counter 1 second prior to a succeeding offer for the same land be recognized as prior to such succeeding offer, opportunity having been given both parties to file under a rule that would have made the filing of both offers simultaneous at least in the absence of any equitable reason for treating both as simultaneous.

M-36435

MAY 9, 1957.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

In a memorandum of April 23, from the Regional Solicitor, Denver Region, the question is presented whether certain oil and gas lease offers filed by different persons for the same land at intervals from 1 second to 10 seconds were simultaneously filed.

The facts with respect to the relative time of filing are as follows:

On March 15, 1957, 17 oil and gas offers were received at and after 10:01 a. m. in the public room of the Land Office for filing within the 1-minute interval. Five offers, C-017021, C-017022, C-017023, C-017024 and C-017025 were filed first by a representative of certain offerors. Approximately 10 seconds later 6 offers, C-017026, C-017027, C-017028, C-017029, C-017030 and C-017031 were filed by another offeror. Approximately 1 second later 5 offers, C-017032, C-017033, C-017034, C-017035 and C-017036 were filed by a representative of another group of offerors. Offer C-017037 was then filed by the same offeror who filed the above referred to 6 offers. The Land Office personnel noted the hour and minute when the above offers were received and the offers were later stamped as having been received by the Land Office at 10:01 a. m. The offers filed within the four above sequences were within the one-minute interval; in some instances cover the same lands.

On March 18, at exactly 10:01 a. m. a representative of an offeror filed offer C-017055 and approximately a second later another offeror filed offer C-017056 covering the same lands. Both offers were

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stamped as having been received at 10:01 a. m. It is noted that two clerks were waiting on the counter but since five persons filed offers within less than one minute it is possible that each clerk received offers which conflict with each other.

It appears that the Land Office at Denver, Colorado, where these offers were filed is opened to the public at 10:00 a. m., Mondays through Fridays; that a basket is conveniently placed near the entrance into which lease offers or applications of any type handled by that office may be placed by persons waiting at the door for the office to open. Any offer or application so placed at the time the office is opened (or as soon as it can be approached for that purpose after the office is opened in case a large number of applicants or offerors are waiting for the opening) are considered as filed at 10:00 a. m.

For the purpose of this opinion, it is assumed that the procedure for filing promptly at 10:00 a. m., is known to all applicants or offerors or that sufficient notice of it is brought to their attention in some adequate manner. If neither is true and the offerors involved in this case were waiting in line and filed their offers at the counter at the earliest moment possible after the office doors were opened, it would appear that the offers would have to be deemed to have been simultaneously filed. *Barbara M. Smoot*, 61 I. D. 337 (1954). It is also assumed for the same purpose that the offerors here involved for some reason, whether to examine the records or other, were not ready or willing to file their offers by depositing them in the basket available for that purpose. With these assumptions it would be immaterial whether the conflicting offers were filed between 10:01 and 10:02 a. m. or within any single minute thereafter during the day prior to the closing of the office at whatever time that occurred.

The governing regulation is 43 CFR 295.8, the second and pertinent sentence of which reads as follows:

* * * When no order of restoration or notice of opening is involved, the applications will be treated as having been filed simultaneously if they are received by a land office (or, if there is no such office in the State, by the Washington Office of the Bureau of Land Management), over the counter at the same time, or are received in the same mail.

It will be noted that applications "received by a land office * * * over the counter at the same time" will be considered as simultaneously filed. Thus, the regulation defines "filed simultaneously" as filed at the same time in specific reference to applications "received" over the counter. This is giving the word "simultaneously" the strictest definition. It has been said that the word "simultaneously," in strict sense, means at precisely the same instant but, in broader sense, at

substantially the same time. *Thomas v. Anderson*, 215 P. 2d 478, 481 (Calif., 1950); and see *In re Searl's Estate*, 186 P. 2d 913, 918 (Wash., 1947); 173 A. L. R. 1247; *Cummings v. Kendall*, 93 P. 2d 633, 635 (Calif., 1939); and *State v. Columbus, Delaware and Marion Electric Co.*, 133 N. E. 487, 488 (Ohio, 1921). Apart from this definition, however, the Department long ago recognized the necessity for using a strict rule with respect to applications, the acceptance of which would confer a preference right under the law. Thus, it has specifically held that "where a few seconds intervened between two applications to contest an entry, the right of precedence should be awarded to the one first actually received, and that 'it matters not how short may have been the interval between the presentation of the two contests, the one actually received before the other is entitled to precedence.'" *Jacobs v. Champlin et al.*, 4 L. D. 318, 319 (1886), quoting from and following *Benschoter v. Williams*, 3 L. D. 419 (1885).

The same rule was stated in 1916 as to applications generally and in *Bumpers v. Holloway*, 48 L. D. 269, 270 (1921), the Department said that that rule had been correctly applied. The language was "Where two applicants for the same land appear together at the local office, the application first handed to the officer or clerk waiting on the counter is entitled to priority."

The Mineral Leasing Act, as amended, provides in cases such as this that "the person first making application for the lease who is qualified to hold a lease under the act shall be entitled to a lease * * *." Act of August 8, 1946 (60 Stat. 951; 30 U. S. C. sec. 226). That provision is mandatory upon the Department. *Bettie H. Reid*, *Lucille H. Pipkin*, 61 I. D. 1, 3 (1952) and *C. T. Hegwer*, 62 I. D. 77 (1955). It may be noted that the *Jacobs* and *Benschoter* cases, *supra*, involved an act which gave a preference right of entry to one who procured the cancellation of an entry by contesting it and does not directly spell out the respective rights of two proposed contestants of such an entry so as to make such rights mandatory as a matter of law. Act of May 14, 1880 (21 Stat. 140; 43 U. S. C. sec. 185). While the law there obviously is mandatory as applied to the first applicant, there might be some room for administrative discretion in determining in a close case the question of priority. But where (1) the regulation is as clear as it is here and (2) the law is, in terms, mandatory and (3) opportunity is afforded all who enter the office at approximately the time of its opening to file simultaneously in a receptacle maintained for that purpose, there is no room for administrative discretion with respect to those who choose to file over the counter. The *Bumpers*

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case is consistent with the present regulation as to applications and offers generally. The *Smoot* case deals with a special situation which, on the facts assumed, is not present here.

In summary: The cases indicate that the rule now clearly stated in the regulations has been applied and followed consistently for many years. The reason for the rule is essentially fair as applied to all types of applications and offers. Under the regulation where one person who files one second in advance of another the two filings do not come within the definition of applications or offers filed simultaneously. This being so, there is a duty, mandatory under the law, to issue a lease to the person first filing an offer for the land no matter how small the interval of time between the two filings.

CHARLES M. SOLLER,
Associate Solicitor.

Approved: May 16, 1957

EDMUND T. FRITZ,
Deputy Solicitor.

WHETHER THE GRANT OF AN EXTENSION TO ASSIGNED UNDEVELOPED PORTIONS OF LEASES IN THEIR EXTENDED TERMS BECAUSE OF ANY PROVISION OF THE MINERAL LEASING ACT OF FEBRUARY 25, 1920 (41 STAT. 437; 30 U. S. C. SEC. 181), AS AMENDED BY THE ACT OF JULY 29, 1954 (68 STAT. 585), INCLUDES AN EXTENSION OF A LEASE BECAUSE OF AN ASSIGNMENT MADE WITHIN AN EXTENDED TERM PURSUANT TO THAT GRANT

Statutory Construction: Generally

A clear expression of Congress is required to justify a construction of a statute which would reverse a general policy of the Government as declared in numerous statutes and where a system of related general provisions has been enacted with respect to a particular subject, new enactments of a fragmentary nature on the subject are to be taken as intended to fit into the existing system.

Oil and Gas Leases: Extensions—Statutory Construction: Generally—Statutory Construction: Legislative History

Where Congress, over a long period of time, has consistently spelled out in detail the conditions under which it has granted the right to extensions of oil and gas leases or the limitations on that right are apparent, departure from that practice, which would result in an illogical and apparently unjustifiable grant, justifies an examination of available extraneous aids, including the legislative history of the law for the purpose of

testing the language of the law against the intent of its enactment. If it is clear that the intent was different than the language implies, then such a construction will be given to it as appears justified as a result of such examination. So construed, paragraph (6) of the act of July 29, 1954, authorizes extensions for undeveloped portions of leases created by one or more partial assignments of a lease in its extended term because of any other provision of the Mineral Leasing Act but does not authorize such extensions because of partial assignments of leases which are in their extended term pursuant to said paragraph (6).

M-36432

MAY 13, 1957.

TO THE SECRETARY OF THE INTERIOR.

On December 14, 1956, Solicitor's Opinion M-36398* held that the provision of the act of July 29, 1954 (68 Stat. 585), which authorized assignment of parts of leases in their extended terms because of any provision of the Mineral Leasing Act, as amended, and the extension of any undeveloped lease resulting from such an assignment, applied to all undeveloped portions of leases resulting from a partial assignment of a lease made during the 5-year extension of the primary term of such a lease. That opinion related to a particular lease which was in the fifth year of the "single extension" of its primary term authorized by section 17 of the Mineral Leasing Act. We did not there consider, nor does the opinion reach the question whether undeveloped portions of a lease which has been extended pursuant to the statutory provision there discussed could be further extended by another partial assignment.

Since the opinion of December 14, 1956, several verbal and two written inquiries have been received asking whether the law contemplated multiple assignments with resulting extensions, each made pursuant to the authority of the particular provision of law in question. None of these inquiries is based upon an actual case. Therefore, there is no present requirement that the question be considered. However, it is one which may have far-reaching consequences by opening the door to the deliberate making of assignments for the sole purpose of continuing a lease in being considerably beyond the period of 12 years which otherwise appears to be the extreme limit that undeveloped land may be held. For that reason it is felt that the question should be determined now.

At first glance, the effect of the language used appears to be not dissimilar to that of section 39 of the act (30 U. S. C. sec. 209), providing for the extension of leases by adding the period of any sus-

*Printed as an appendage to this opinion, on p. 135.

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pension of operations and production to the term of the lease affected by such a suspension. It was held in solicitor's opinion, 60 I. D. 408 (1950) that this provision was not limited to a single suspension nor to extensions of the original term but that a suspension during a period of extension resulting from a prior suspension would further extend the lease.

There is for consideration, however, the question whether the language of the amended provision, in and of itself so clearly *means* that multiple extensions are authorized as to prohibit consideration of anything which might show a contrary *intent*. With respect to the question considered in the cited opinion, there was apparent a practical justification for the conclusion reached. There the Secretary was required to determine that suspension of operations and production would be in the interest of conservation. If he did that *and* suspended the operations then certain results—including the extension of the lease—followed by the authority of the law. Therefore, the suspension of operations and production referred to in the opinion must be presumed to have been warranted "in the interest of conservation" because of reasons sufficient to excuse a lessee from complying with the terms of the lease requiring operation and production, and, in that situation, an extension of the period to enable him to enjoy the full benefits contemplated when the lease was issued was only simple justice. Here, there is no comparable reason for multiple extensions unless it can be postulated that *any* assignee of an undeveloped portion of a lease is entitled to a reasonable period of time in which to drill a well. That this is unlikely is evidenced by the fact that there can be no assignee without an assignor, and, absent production on the retained portion of the lease, it will also be extended. It might even be argued that Congress was so firmly convinced that an assignee should be given at least 2 years in which to develop his lease that it was willing that the assignor also should share the grant and if the extension could not be granted to the assignee any other way this argument would be entitled to consideration. But Congress could have granted an extension to the assignee alone. As will be shown, however, Congress did nothing to show any intent to grant extensions of undeveloped portions of leases created by assignments made during the extended period provided for in the language here under consideration.

The amendment is a grant by the United States and is, therefore, to be construed strictly in favor of the Government especially since the legislation was initiated at the behest of those most interested in

it.¹ See *Blair v. Chicago*, 201 U. S. 400 (1906), and *cf. District of Columbia v. Johnson*, 165 U. S. 330 (1897). The language, as it reads, may either grant extensions where assignments are made in any of the several other extended periods authorized by the act or in them and in extensions authorized by the provision itself. We have already said that it does the former because the language clearly means at least that much. If it does the latter, it not only *grants* an extension but it permits a lessee by his own act and intent to create a situation in his favor upon which the right to further extensions may be obtained. Section 39 of the act does not permit of the creation of such a situation. As the law and cited opinion both make clear, it is not one that the lessee can manufacture but is one that results from the force of circumstances beyond the control of the lessee.

It is well established that a clear expression of the intention of Congress is required to justify a construction of a statute which would amount to a reversal of a general policy of the Government as declared in numerous statutes. *United States v. Fisher*, 2 Cranch 358 (6 U. S.) (1805). And, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be put into conformable effect, unless the contrary clearly appears. *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1934); *United States v. Arizona*, 295 U. S. 174 (1935), and see also *United States v. Barnes*, 222 U. S. 513, 520 (1912); *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301 (1903); *Panama R. R. Co. v. Johnson*, 264 U. S. 375 (1924); and *United States v. Sweet*, 245 U. S. 563, 572 (1918). These two sound and fully accepted principles of law when applied to the situation under consideration will show conclusively that the amendment under consideration cannot be construed to warrant multiple extensions each applicable to the same land based upon successive partial assignments of the same lease so as to give an assignor and an assignee or several of each a total period of extensions in material excess of 2 years.

A search not only of the mineral leasing laws but of the entire system of public land laws, exclusive only of the mining law, which is generally recognized to be an intended exception to the general rule so far as acquisition of possessory rights only is concerned, will

¹ Testimony of Howard M. Gullickson and statement of Clarence E. Hinkle, pages 20 and 44, respectively, Hearings before the Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U. S. Senate, 83d Cong., on S. 2380. These witnesses represented the two principal oil and gas associations interested in public land oil and gas leases.

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show that Congress has at all times been careful to release its exclusive constitutional control over the property of the United States only under carefully specified terms and conditions. With respect to the mineral leasing laws themselves, it has always retained the right to grant favors and in granting them has been specific in defining their extent and limits and the conditions to be observed in their exercise. To construe the provision in question as applying to all other extensions in terms provided for by the act is necessary from the plain language of the statute. That construction would apply to as many partial assignments out of a single lease as may be made within the period of any other extension authorized by the act, for it is clear that the authority is not limited to a single partial assignment since the language is plural. Such a construction is not so inconsistent with the general legislative policy in such matters as to require that we look behind the language of the law itself. This is particularly true when we look at the other liberal provisions of the amendatory act of 1954 of which it is a part. But there is nothing elsewhere in that act or in the laws which it amends that warrants a conclusion that Congress intended to depart so far from the established system for leasing minerals in the lands of the United States as to freely give to lessees the power, by the mere acts of periodically assigning off 40-acre tracts from a 2,560-acre lease, to continue the lease as to any part thereof for additional periods which could aggregate nearly 126 years over and above the approximately 12-year period otherwise available.

A study of the other extension provision of section 30 (a) which immediately precedes this one (as amended in 1954) clearly shows that the extension (or extensions) there provided must have as their basis a partial assignment (or partial assignments) made during the pre-authorized primary term. No provision is here made for partial assignments made *after* expiration of the primary term. A cursory review of the 1954 act shows that paragraph numbered (1) limits the extension of a lease upon cessation of production to 60 days plus periods of actual reworking or redrilling operations and a producible lease may continue for not more than 60 days after notice requiring production. These provisions relate to leases which have been developed to production at considerable expense of time and money. Yet, the grant of an extension in the last situation mentioned is subject to be limited to 60 days and in the first may go beyond that only if further work is done as an earnest of good faith. In paragraph (2) a new extension is provided for noncompetitive leases upon known producing structures. But this is limited to a single extension of 2 years. Paragraph (3) grants an additional extension, in terms limited to 1

year, where compensatory royalty payments are discontinued. Paragraph (4) grants an extension as to non-unitized lands within a lease where the remainder is committed to a unit plan. This extension continues the lease for the same period it would have run if the remainder had not been severed and committed to a unit agreement. The fairness of this provision—which may continue the un-unitized portion for beyond 2 years—is obvious. Committal of that part of the land on the unitized structure would otherwise foreshorten the life of the remainder. Since the unit agreement is in the interest of conservation, hence a public benefit, the lessee whose lease is divided should not be deprived of what he could hold without commitment of any land to the agreement. Paragraph (5) is a clarification of a prior provision. Paragraph (6) is the one under consideration. Paragraph (7) provides for the automatic termination of undeveloped leases upon the failure to pay annual rentals when due.

Paragraph (6) may be interpreted, consistent with the other amendments, to authorize as many partial assignments of a lease in its extended term by reason of any other extension provision of the act as the acreage involved will permit, either by the holder of the whole lease as so extended or successively by him and his assigns so that the resulting undeveloped portions may be further extended from 1 day to 2 years minus 1 day. Such a construction definitely and certainly rests upon a basic authority for the extended term to which the new extension (or extensions since they may vary in length although none can exceed 2 years) is added which differs, more or less depending on the type of base extension, from the authority for the overriding extension. But, if the overriding extension provides the basis for a second overriding extension, the second a basis for a third, and so forth, then the authority must be deemed not a single authority to extend undeveloped portions of leases but a complex self-perpetuating breeder of extensions. The construction we willingly give may result in several extensions all less than 2 years so that the extent of the authority is definite resting within the purview of Congress and the Department. Beyond that, only the lessee and such willing assignees (the latter may as easily be co-conspirators as prospective developers) can determine when the end will come.

The inconsistency here is so great and so apparent in and of itself as to raise a serious doubt that the language was intended to do more than to grant extensions of parts of leases assigned during periods of extension authorized elsewhere in the act. This is all the more true when, so far as the lessee is concerned, the purpose was not to relieve him of the evil consequences of happenings beyond his control; and, so far as possible future assignees are concerned, there

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is nothing to show any positive intent to change the basic system for acquiring Federal lands for oil and gas exploration from a leasing system pure and simple by delegating to the holders of leases the right to traffic in them (or parts of them) seriatim for considerably more than a generation. To so hold would be to say that Congress intended to permit lessees and their assignees to hold at least a part of the leased lands several times as long as one who made no assignment could hold his lease. In addition to the fact that what might be fair if limited to a 2-year extension of tenure would become ridiculously unfair if applied to more than 126 years of tenure, such a construction would put a premium upon fraud, for it provides a ready vehicle for assignments made for the sole purpose of holding lands without development. The history of the act shows that its purpose is to promote, not to thwart development, and Congress cannot be presumed, absent any evidence of such an intent, to have enacted legislation designed to defeat its own purpose in order to give the holders of leases duplicate extensions wholly without cause or basis. This would be inconsistent with all of the remainder of the leasing law and with the previous practice of Congress.

From the very enactment of the Mineral Leasing Act, that body has recognized the value of permitting free assignment of leases to persons qualified under the act, and all along it has been most liberal in providing authority to assign, and in allowing assignees a reasonable time in which to develop the assigned lands, in every situation where it was shown that such authority either tended to accomplish the purpose of the act or that the assignee was equitably entitled to more time than the law formally afforded. In the amendment here considered, it did so even though as a result the assignor might also, in some cases, receive an extension of time on his unassigned acreage. But in no case that has been found has it authorized the Secretary to grant multiple extensions of leases except in those cases where, as in section 39, *supra*, it laid down the specific conditions which would justify such extensions.

Further, there is reason to believe that the primary, if not the real purpose of the provision, was to permit partial assignments to be made within *any* extended period of a lease under the apparent belief that under the then law such partial assignments could only be made of leases in their extended term because of production and that the extension was a result of that rather than a purpose in and of itself. The provision, prior to the 1954 amendment, reads: "Assignments under this section may also be made of parts of leases which are in their extended term because of production * * *." This followed, as does the amendment of it, a provision for the

partial assignment of leases (and the extension of the undeveloped portions) in their primary term. The Department, in its analysis of the provision, stated the gist of the existing law on this subject and added: "The proposed amendment * * * would permit partial assignments of such lease in its extended term, no matter what the reason was for such extension." In its report on the bill, it said the same thing in different words. Both the analysis, prepared at the request of the committees of the House and Senate, and the report were set forth in full in the committee reports S. Rept. 1609 and H. Rept. 2238, 83d Cong., 2d sess.

It is to be noted that the only changes of this provision, including both the authority to assign and the extension language made in the 1954 act, were to enlarge the authority to assign, to eliminate the word "and" following and to make a new sentence of the language providing for extensions. Since the two changes last mentioned did no more than to make a change in the structure of the language, there was no reason to comment on them *per se* as amendments. The enlarged effect of the extension provision was a *result* of the amendment of the assignment clause and not a new statement. The only pertinent testimony (pages 20 and 44) of the record of testimony before the Senate Interior and Insular Affairs Committee) and the only pertinent statement made on the floor (that of Senator Barrett, page 9597 of the Congressional Record, 83d Cong., 2d sess.) [100 Cong. Rec. 10035] referred in effect to the fact that where there is no present authority for extension this would supply it. Thus, Congress apparently accepted the Department's analyses. There is, therefore, no expression or other concrete evidence of any intention to reverse the general policy with respect to extensions of leases. On the contrary, there is every evidence that Congress had in mind furtherance of the settled policy rather than that this legislation should constitute a departure from it.

Nothing in this opinion is to be understood to mean that leases may not be assigned in whole or in part during any period of extension found to be authorized by paragraph (6). The first sentence of section 30(a) of the act (30 U. S. C. sec. 187a) authorizes such assignments during any period in the life of a lease. Solicitor's Opinion M-36278, May 31, 1955 (62 I. D. 216).²

² It is interesting to note that the original provision had never been construed in any decision of the Department or in any legal opinion but that subsequent to the 1954 amendment, and it may be because of the resulting implications, the holders of portions of leases assigned prior to the date of the amendment during the extended terms of leases where based on reasons other than discovery asked that the question be considered. Solicitor's Opinion M-36278, referred to in the text, resulted in which it was concluded that such assignments were within the law as it existed prior to its amendment in 1954. Thus, the net effect of the amendment appears to have been to provide for an additional extension of assigned portions of leases, a result which seems not to have been seriously considered by Congress when it enacted it.

It is my opinion that the provision in question authorizes additional extensions only where assignments of parts of leases were extended by other extension provisions in the act as amended and that once the lease or leases are so extended pass into their additional extended terms the law has been fully executed. It was not intended to nor does it react upon itself to provide for extensions of parts of any lease assigned after such lease has gone into its additional extended term as a result of assignments and consequent extensions made pursuant to the provision.

EDMUND T. FRITZ,
Deputy Solicitor.

APPENDAGE TO M-36432, MAY 13, 1957, P. 127

**PARTIAL ASSIGNMENT OF OIL AND GAS LEASES
UNDER THE ACT OF JULY 29, 1954 (68 STAT. 585)
AMENDING SECTION 30a OF THE MINERAL LEASING ACT
OF 1920, AS AMENDED (30 U. S. C. SEC. 187a)**

Oil and Gas Leases: Assignments or Transfers

The partial assignment of oil and gas leases during their extended 5-year terms under the act of July 29, 1954 (68 Stat. 585), amending section 30a of the Mineral Leasing Act of 1920, as amended (30 U. S. C. sec. 187a), has the effect of continuing in force all segregated leases of undeveloped lands for a period of 2 years from the effective date of the assignment and so long thereafter as oil or gas is produced in paying quantities, regardless of whether such segregated leases constitute the assigned or the retained portions of the original lease.

M-36398

DECEMBER 14, 1956.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

A question has been raised as to the effect of a partial assignment filed with the Bureau by the record title holder, Richland Oil Development Co., in connection with oil and gas lease Evanston 021588 issued February 1, 1947, and now in its extended 5-year term under section 17 of the Mineral Leasing Act of 1920, as amended (30 U. S. C. sec. 226).

The effect of such a partial assignment is covered by the following language of section 30a of the Mineral Leasing Act, *supra* (30 U. S. C. sec. 187a), as amended by the act of July 28, 1954 (68 Stat. 585):

* * * Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned

lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of said sections. *The segregated lease of any undeveloped lands* shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities. [Italics added.]

The final two sentences of this section of the act constitute the amendment provided in the act of July 28, 1954, *supra*.

The assignment in question is now pending in the Manager's office for approval action. Upon its approval, the assigned and the retained portions of the lease will be segregated into separate leases; and, since all the lands in both the assigned and retained portions are undeveloped, each portion will become a segregated lease of undeveloped lands. As I interpret the above-quoted provisions of the leasing act, each will then "continue in force and effect for two years and so long thereafter as oil or gas is produced in paying quantities."

It is my opinion that the language of the act in its reference to "[The] segregated lease of *any* undeveloped lands * * *

 must be said to apply to *all* segregated leases of undeveloped lands regardless of whether they constitute the assigned or the retained portions of the original lease. Section 30a of the act, as above, states that: "Any partial assignment of any lease shall segregate the assigned and retained portions thereof * * *; and such segregated leases shall * * *." Thus, the applicable section of the act itself refers to both the assigned and the retained portions of an assigned lease as being "segregated leases" and there is nothing to indicate that the later reference in the same section to a "segregated lease" was used in a more limited sense. Further note is taken of the fact that the provision of the act which was amended in 1954 provided only for the extension of undeveloped assigned portions of leases which were in their extended term because of production (60 Stat. 955), while the amendment (68 Stat. 585) from its very nature would also apply to leases which were in their extended terms for other reasons and which might or might not have production. Therefore, the use of the word "any" necessarily must be read as though it were "all."

The express language of the act is clear on the question which has been raised. It must therefore be concluded that upon approval of the partial assignment of oil and gas lease Evanston 021588, both the assigned and the retained portions will constitute segregated leases within the meaning of the last sentence of section 30a of the act and will be continued thereunder for a minimum of two years and so long thereafter as oil or gas is produced in paying quantities.

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However, the leases segregated by such partial assignment are not to be viewed as being limited to continuance for two years in cases where the term of the base lease would continue for a longer period. In such cases the terms of the segregated leases would be co-existent with the term of the base lease. Solicitor's Opinion M-36278, 62 I. D. 216 (1955).

EDMUND T. FRITZ,
Acting Solicitor.

RUBY D. MOORE ET AL.

A-27346

*Decided May 14, 1957***Desert Land Entry: Classification**

It is proper to refuse to classify lands for desert land entry where it is shown that the soil and topography of the lands applied for are such that the lands are unfit for cultivation.

Desert Land Entry: Classification

It is proper to refuse to classify lands for desert land entry where it is shown that the applicants intend to rely on percolating water for the irrigation of the lands and where it is shown further that there is no percolating water in the groundwater basin surplus to the needs of the private landowners in the basin.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

These are appeals to the Secretary of the Interior from a decision for the Director of the Bureau of Land Management dated January 17, 1956, affirming the action of the manager of the land office at Los Angeles, California, in rejecting nine applications to enter lands in Ts. 19 N., Rs. 12 and 13 E., and T. 20 N., R. 12 E., S. B. M., California, under the provisions of the Desert Land Act (43 U. S. C., 1952 ed., secs. 321-339), because the lands had been classified as unsuitable for disposition under that act.¹

All of the vacant, unreserved, and unappropriated public land in California was withdrawn from settlement, location, sale or entry and reserved for classification by Executive Order No. 6910 dated No-

¹The names of the applicants and the serial numbers of the applications considered in this decision are:

Ruby D. Moore-----	Los Angeles	0105541
Charles A. Harris-----	" "	0105810
Allen Ashdill Peterson-----	" "	0116221
Josephine Morris-----	" "	0121691
Jo Abel-----	" "	0131504
Howard Bob Roberts-----	" "	0131505
Eugene E. Williamson-----	" "	0131510
Charles V. Thomas-----	" "	0131512
George R. Greene-----	" "	0131513

The applications of Ruby D. Moore and Charles A. Harris cover the same land.

ember 26, 1934. By section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315f), the Secretary of the Interior (or his designated representative) is authorized, in his discretion, to examine and to classify such withdrawn land and, when he finds that land to be more valuable or suitable for purposes other than those provided for by the Taylor Grazing Act, to restore such land to entry.

The lands involved in these appeals are within the Mesquite Valley drainage basin. A field examination of the lands was made and it was on the basis of that examination that it was determined that the lands are not suitable for disposition under the provisions of the Desert Land Act, which, among other things, requires that the applicant show a right to appropriate water (43 U. S. C., 1952 ed., sec. 321); that the lands be desert in character—i. e., lands which will not, without irrigation, produce some agricultural crop (sec. 322); that the lands be reclaimed by conducting water upon the same (sec. 321); and that before a patent can issue proof shall be required of the cultivation of at least one-eighth of the entry (sec. 328).

Five of the applications² were rejected on the ground that the topography of the lands under those applications was such that it would not permit the cultivation of one-eighth of the land covered by each application, and four of the applications³ were rejected because there did not appear to be sufficient water for the irrigation of additional lands in the Mesquite Valley.

In their appeal to the Secretary, none of the five applicants whose applications were rejected because of adverse topographic conditions presents anything to refute the classification of those lands as unsuitable for entry under the Desert Land Act. The report of the field examination shows that the lands covered by four of these five applications lie on the gravelly to rocky alluvial slopes of the valley and that because of the nature of the soil found on those slopes and the rough and mountainous terrain the lands are not suitable for cultivation, regardless of whether water is or is not available for the irrigation of those lands. With respect to the fifth application rejected on this ground, that of Eugene E. Williamson, the field examination revealed that 200 of the 320 acres applied for are sand dunes and the balance is lake playa. This land, like the rough land found on the alluvial slopes, is, on the basis of its soil alone, unfit for agriculture. As the report of the field examination supports the classification of these lands as unsuitable for disposition under the Desert Land Act, the classification will stand. The rejection of these five applications is, accordingly, affirmed.

² The applications of Jo Abel, Howard Bob Roberts, Eugene E. Williamson, Charles V. Thomas, and George R. Greene.

³ The applications of Ruby D. Moore, Charles A. Harris, Allen Ashdill Peterson, and Josephine Morris.

The appellants whose applications were rejected because it was found that there is not sufficient water to permit the irrigation of additional lands in Mesquite Valley⁴ intend to rely on percolating water underlying the lands. They contend that there is sufficient underground water in the basin for the reclamation of the lands applied for. They state that since the field examination was made many additional wells have been drilled on patented lands in the Mesquite Valley and that those wells have not lowered the water level. They present no evidence to support this latter statement.

The Department, on March 21, 1957, held in *Ruby E. Huffman et al.* (64 I. D. 57), that while it would not reject applications to make desert land entries in California on the ground that the applicants intended to use percolating water for the reclamation of the land, nevertheless such applications would be allowed only when, in the exercise of the discretion vested in the Secretary of the Interior by section 7 of the Taylor Grazing Act, as amended, it is determined that there is a sufficient supply of percolating water to enable the reclamation of the entries, taking into consideration the rights and needs of other lands for such percolating water.

It was pointed out in that decision that in a groundwater basin where there is a substantial amount of land in private ownership the entryman's right to the use of percolating water would be subordinate to the correlative rights of private landowners and that the entryman would have only the right to appropriate water surplus to the needs of the private landowners.

A large portion of the Mesquite Valley basin is patented land, and thus in private ownership. Under California law, the owners of such lands overlying an underground basin have correlative rights to the use of the percolating water in the basin. Each such owner has the right to a proportionate share, with other overlying owners of private lands, of such percolating water as he can put to a reasonable beneficial use on his overlying land. Only that portion of percolating water surplus to the needs, present and prospective, of overlying private landowners in a basin may be appropriated. As desert land entries may not be allowed unless it can be shown that the applicants have rights to the use of sufficient water to reclaim the land, such entries may not be allowed in the Mesquite Valley unless it is shown that there is a supply of groundwater in the Valley basin surplus to the needs of the owners of the patented lands.

The report of the field investigation indicates that on the basis of the best evidence available in 1952, when the field examination was made, the Mesquite Valley basin is a totally enclosed basin which re-

⁴ Charles A. Harris, Allen Ashdill Peterson, and Josephine Morris filed individual appeals.

ceives its only source of recharge to the groundwater reservoir from precipitation occurring within the limits of the Mesquite Valley drainage basin. It was estimated that the total recharge amounted to 1,630 acre feet annually. The report contains the following significant statements:

Over a period of many years, probably extending into geological time, the normal recharge reaching the deep, underlying strata has accumulated. With no withdrawal by deep wells until less than one year ago the ground water storage would appear to be near its maximum capacity and capable of producing good wells in areas where its strata are permeable enough to allow rapid withdrawal of the water. While new wells in favorable locations may thus yield sufficient water for irrigation, it must be recognized that heavy withdrawals will rapidly deplete the ground water supplies unless balanced by an equal recharge from the watersheds of the basin.

At the time of examination there were three newly drilled wells in Mesquite Valley capable of pumping sufficient water for irrigation purposes.

To calculate the acreage which can be irrigated from deep wells in Mesquite Valley without depleting the ground water reservoirs, the maximum annual recharge of 1,630 acre feet may be divided by the water requirement of cotton, which approximates 4.2 acre feet. It is found that 390 acres of cotton on class II soil would demand the recharge for one year. Two hundred ninety seven acres of alfalfa on class II soil would require the same amount of water.

In order to produce a land classification not inconsistent with the need for conservation of underground waters of the Mesquite drainage basin, it was necessary to evaluate the amount of water which can safely be withdrawn each year without depletion of the supply. Findings made in this portion of the study were unfavorable to agricultural development, since the evidence indicated that a maximum of only 1,630 acre feet may be withdrawn annually without depletion of the ground water reserves. That amount of water would be sufficient to irrigate approximately 300 acres of alfalfa or 390 acres of cotton. Private lands for which ground water rights might be claimed amount to some 14,000 acres which could demand in the neighborhood of 56,000 acre feet annually. It may be seen that the estimated annual recharge is only about 3 per cent of the demand for ground water which could come from private property if the owners desired to irrigate. There are indications that a movement in this direction is taking place, since at least two irrigation wells have been recently drilled on private lands, and ground has been prepared for farming. It is altogether probable that rejection of applications on the basis of insufficient ground water recharge will bring the statement that large wells are now pumping with indications that others can be brought into production. These facts are not disputed, but it is pointed out that such production in excess of ground water recharge will constitute a "mining" of water which has been accumulated since geological time, and the underground reservoirs will be depleted in the manner of those in the San Joaquin Valley and southern Arizona areas.

The appellants have confirmed the prediction of the field examiner that additional wells would be drilled on the private lands in the

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valley and that additional private lands would be placed under irrigation.

It seems apparent that if the private landowners in the basin are now using the water on their overlying lands in excess of the annual recharge to the basin, the water supply in the basin is being depleted and that there is at this time no surplus available for appropriation by desert land entrymen, should applications to make desert land entry be allowed. The appellants in the present case cannot show that they have a right to appropriate water for the irrigation of the lands, a prerequisite to the allowance of desert land entries.

As there is apparently no underground water subject to appropriation for use on the lands here involved, it cannot be held that these lands are suitable for disposition under the terms of the Desert Land Act. *Ruby E. Huffman et al., supra.*

In the circumstances, it was proper to classify the lands as unsuitable for such purposes and that classification will stand. The rejection of these four applications is, accordingly, affirmed.

HATFIELD CHILSON,

Acting Secretary of the Interior.

ESTATE OF MINNIE MEHOJAH ROWE, KAW ALLOTTEE NO. 77

IA-852

Decided May 21, 1957

Indian Lands: Descent and Distribution: Wills

The authority of the Secretary of the Interior to approve an Indian's testamentary disposition of restricted property under 25 U. S. C. sec. 373 is not limited by the law of the State or by an agreement for the division of the estate which is entered into by persons claiming an interest therein.

Indian Lands: Descent and Distribution: Wills—Indian Lands: Individual Rights in Tribal Property: Annuity and Per Capita Payments

In making a per capita distribution of tribal funds under the act of August 9, 1955 (69 Stat. 559), which calls for distribution to the "heirs or devisees" of deceased members of the tribe, it is proper to distribute the funds to a general residuary legatee.

Solicitor's Opinion of May 2, 1944, 58 I. D. 680, distinguished.

**APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS**

Mr. Watt Rowe, through his attorneys, Geb & Moriarty, has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance dated September 7, 1956, denying his petition for a rehearing in the matter of the Estate of Minnie Mehojah Rowe, deceased Kaw allottee No. 77, who died testate on July 24, 1950, at

the age of 55, a resident of Oklahoma, leaving a restricted estate valued at \$20,990.57.

The Examiner of Inheritance, by an order dated May 31, 1956, determined the decedent's heirs, approved the decedent's last will and testament dated May 21, 1940, and ordered a distribution of the restricted estate consisting of Kaw trust funds, to the son, Clyde G. Monroe, Kaw unallotted, sole residuary beneficiary, under the last will and testament of decedent.

By the terms of decedent's last will and testament she makes specific devises of her real property to her son, Clyde G. Monroe, and to her husband, Watt Rowe, all of which was non-trust property. By the residuary clause she devises and bequeaths all of the rest and residue of her estate, real and personal, and mixed, to her son, Clyde G. Monroe. This will was admitted to probate for the decedent's non-trust estate on December 14, 1950, in the County Court of Kay County, Oklahoma.

It was determined that the decedent left her surviving the following heirs at law, in accordance with the laws of the State of Oklahoma, whose shares in the estate, had she died intestate, would be:

Watt Rowe, Cherokee—husband.....	½
Clyde G. Monroe, Kaw unallotted—son.....	½

In the probate proceedings in the County Court of Kay County, Oklahoma, the appellant, Watt Rowe, filed an election as the surviving husband of the deceased to take under the law of descent and distribution of the State of Oklahoma and not under the last will and testament of the deceased, under Section 44, Title 84, Oklahoma Statutes, 1951. The probate proceedings of the Kay County Court were completed after a stipulation by Watt Rowe and Clyde G. Monroe, that the assets of the estate of Minnie Mehojah Rowe, deceased, be distributed, one-half to Clyde G. Monroe and one-half to Watt Rowe, and the non-trust property of the estate was distributed accordingly.

At the hearing by the Examiner of Inheritance, an authenticated copy of the entire file of the proceedings of the Kay County Court was made a part of the record, to be considered along with the evidence.

The appellant filed with the Examiner of Inheritance a petition for rehearing, which was denied by order dated September 7, 1956, which denial was based on the fact that Items of Error No. 1 and 2 of the petition were considered and determined in the original decision and decided adversely to the petition, and that no new additional facts or contentions were alleged in said Items of Error. The remaining contention as contained in Item of Error No. 3, was also denied by the Examiner of Inheritance, citing pertinent law indicating that the Kaw trust funds are such assets as would pass under the residuary clause of the decedent's will.

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In his notice of appeal the appellant contends that the funds arising out of the distribution of the judgment obtained by the Kaw Tribe of Indians against the United States of America are subject to distribution under the provisions of the law of the State of Oklahoma, and that these funds are not subject to the provisions of Title 25, U. S. C. sec. 373. Said section 373 reads in part:

Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or *individual Indian moneys or other property held in trust by the United States* shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will * * *. [Italics ours.]

The words "Individual Indian Moneys or other property held in trust" clearly include the Kaw trust funds of this estate and can, under the above section 373, be distributed by will. As to the funds being subject to distribution under the provisions of the law of the State of Oklahoma, appellant's contention rests upon the assumption that the State law relating to "forced" heirs should be applied. This contention was considered by the Examiner of Inheritance and determined in the Order approving will and Decreeing Distribution dated May 31, 1956; finding that State laws relative to forced heirs and Indian wills are not applicable to proceedings in this Department, citing: *Blanset v. Cardin*, 256 U. S. 319 (1921); *Homovich v. Chapman*, 191 F. 2d 761 (1951); *Estate of Mer-dak-ke (Herbert Homovich)*, IA-14, December 14, 1949; and *Estate of Lyon Saupitty*, IA-52, August 13, 1951. Also that "The Secretary has no authority to reform an Indian's will. His authority is limited to the approval or disapproval of a will, and he cannot change its provisions." See *Estate of Kesiah Samuel*, IA-32, October 20, 1950, and *Estate of Kosope Maymahonah*, IA-141, October 28, 1954. This is well settled law correctly followed by the Examiner of Inheritance.

Appellant also contends that the Examiner of Inheritance did not comply with the regulations of the Department for the reason that he did not, in approving the will, determine the reasons, by the testatrix, for making distribution in a manner contrary to the laws of the State of Oklahoma. It appears that appellant has reference to the regulations contained in 25 CFR 82.30, Wills, under "Determination of Heirs and Probate of the Estates of Deceased Indians of the Five Civilized Tribes," which regulation is not applicable to this estate.

The further contention by appellant that the contract between the parties hereto agreeing to share the estate equally is a binding contract given for a valuable consideration and is applicable to these funds, was properly denied by the Examiner of Inheritance in the original order

approving will and decreeing distribution, in which it was stated: "the grounds for denial are that any stipulation entered into by the appellant and the son of decedent in the Kay County Court to divide the decedent's estate equally between them is not binding on the Department in this proceeding. Also that the Court has no jurisdiction over the decedent's Kaw trust funds, and that such stipulation has reference only to the 'Assets' under the Court's jurisdiction." This interpretation by the Examiner of Inheritance was clearly correct.

The further contention by appellant that the will is not applicable to these funds for the reason that the will does not specifically devise the Kaw trust funds was given consideration by the Examiner of Inheritance in the "Order Denying the Petition for Rehearing."

A well established rule of law was given that a residuary clause such as contained in the decedent's will "should be construed liberally * * * it is not limited to property in which the testator has an interest in possession, but includes property in which he has interests in expectancy." Page on *Wills*, pp. 87 and 88, vol. 3 (Lifetime Edition). Also, that courts have held that similar wording in residuary clauses passed an interest which the testator did not know that he possessed, and which resulted in the payment of money into his estate after his death, citing *Evans v. Pennington*, 177 Ga. 56, 169 S. E. 349; *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 156; and *McGlathery's Estate*, 311 Pa. 351, 166 Atl. 886. We concur with the conclusion that the Kaw trust funds are assets which passed under the residuary clause of the decedent's will. Contrary to the contention of appellant, this conclusion is in accord with the intention of Congress relating to the distribution of these funds under the act of August 9, 1955 (69 Stat. 559), providing in part "[such funds] shall be distributed among his heirs or devisees." Certainly no other interpretation can be placed on this wording but that Congress intended that distribution should be made to the heirs, if the member died intestate, or to the devisees if the member died leaving a will. This statute, by expressly providing for distribution to heirs or devisees, is clearly distinguishable from that considered in the Solicitor's opinion of May 2, 1944 (58 I. D. 680).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised, 17 F. R. 6793), the Order of the Examiner of Inheritance denying the petition for rehearing is affirmed and the appeal is dismissed.

The Pawnee Area Field Representative is directed to distribute the decedent's estate in accordance with the Examiner's Order dated May 31, 1956.

EDMUND T. FRITZ,
Deputy Solicitor.

*March 29, 1957***APPEAL OF CENTRAL WRECKING CORPORATION****IBCA-69***Decided March 29, 1957****Contracts: Appeals—Contracts: Contracting Officer**

During the period of 30 days allowed for the taking of an appeal from a contracting officer's decision, made pursuant to the "disputes" clause of the standard form Government contracts, the contracting officer may withdraw or change his decision; and, if he does so before an appeal has been taken, the running of the original period of 30 days is tolled, and a new period commences to run at such time as the contractor receives a copy of an amendatory or substitute decision. A communication from a contracting officer to a contractor, in order to amount to a decision that will start running the period for appeal, must, at least, be so worded as fairly and reasonably to inform the contractor that a determination under the "disputes" clause is intended.

Contracts: Notices—Contracts: Waiver and Estoppel

The Board of Contract Appeals will not reject a claim for an extension of the performance time of a contract because of want of proof that the contractor has complied with an applicable notice requirement of the contract if such requirement is one that is subject to waiver, and if no authorized representative of the Government has asserted that the contractor failed to give timely notice or has asked that compliance with the notice requirement be proved by the contractor.

Contracts: Changed Conditions—Contracts: Interpretation

Statements in the specifications of a standard form Government contract to the effect that Government-furnished information is not guaranteed, or that bidders are expected to inform themselves of all existing conditions, or that failure to estimate correctly the difficulties attending the execution of the work will not be a basis for relief, supplement the General Provisions of the contract, but do not supersede or override them, and do not preclude the allowance of extensions of time under the "changed conditions" clause in the event the contractor encounters conditions that fairly meet the standards prescribed by that clause.

Contracts: Changed Conditions

A contractor who, in the course of performing a standard form Government contract for the demolition of an existing building, encounters hidden structural conditions of which the contractor was unaware at the time of submitting its bid is entitled, under the "changed conditions" clause, to an extension of time on account of delays caused by such structural conditions, if their presence was not disclosed by any of the drawings furnished the contractor by the Government, would not have been revealed by an inspection of the scope which a prudent bidder could reasonably have been expected to make in advance of submitting its bid, and was not a feature usually found in a building of the type to be demolished.

*Not released for publication in time for inclusion chronologically.

Contracts: Delays of Contractor

A delay in the performance of the contract work caused by the contractor's failure to provide enough foremen or workmen with the requisite amount of "know-how" to complete the job within the time specified in the contract is not excusable, for it is the contractor's responsibility to solve the technical problems incident to the performance of the contract work, even though they may be of a novel character, and to provide competent employees in sufficient numbers to complete the job, barring unforeseeable conditions or events, within the specified time.

Contracts: Changed Conditions—Contracts: Delays of Contractor—Contracts: Unforeseeable Causes

Where a delay in the performance of the contract work is caused in part by excusable circumstances, such as the encountering of a "changed condition", and in part by inexcusable circumstances, such as a failure by the contractor to make adequate provision for overcoming known or expectable difficulties, an extension of time may be granted for so much of the total period of delay as fairly approximates the amount of time lost by reason of the excusable circumstances, even though the time so lost is not susceptible of precise determination because of the concurrent nature of the various causes of delay.

Contracts: Unforeseeable Causes

Compliance with contractual provisions requiring that the contractor exercise a high degree of care for the safety of historic buildings, users of public streets, and persons and property generally in the vicinity of the site of the contract work, and observe municipal restrictions upon the manner in which the contract work may be done, is not in and of itself an excusable cause of delay.

Contracts: Appeals—Contracts: Unforeseeable Causes

A contractor who claims that the contracting officer erred in denying a request for an extension of time, whether in whole or in part, has the burden of proving the existence of facts sufficient to support the granting of such extension of time, or of so much thereof as was denied by the contracting officer.

Contracts: Unforeseeable Causes

The term "unusually severe weather" in the "excusable causes of delay" paragraph of the standard form Government contracts means only weather surpassing in severity that usually encountered or reasonably to be expected in the particular locality during the time of year involved.

BOARD OF CONTRACT APPEALS

Central Wrecking Corporation, of Philadelphia, Pennsylvania, has filed an appeal, dated January 28, 1956, from a decision of the contracting officer, in the form of a letter dated January 12, 1956, denying a request for a four months' extension of time.

The dispute arises under a contract with the National Park Service for the demolition of the Drexel Building, Fifth and Chestnut Streets,

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Philadelphia, Pennsylvania, for a consideration of \$154,800. The contract is on U. S. Standard Form 23 (Revised March 1953), incorporates the General Provisions of U. S. Standard Form 23 A (March 1953), is dated February 25, 1955, and bears the designation No. 14-10-129-2 (IND).

Paragraph 3-01 of the specifications, as modified by Addendum I, provided that the entire work should be completed within a period of 270 days beginning on April 10, 1955, and thus established the final date for completion of the work as January 4, 1956. Prior to the taking of the present appeal, extensions of time aggregating 70 calendar days were allowed by the contracting officer, thereby deferring the final date for completion of the work to March 14, 1956.¹ Clause 5 of the General Provisions made appellant liable for liquidated damages in the event completion of the work was delayed beyond the time stipulated in the contract or allowed by any extension granted pursuant thereto, and paragraph 3-02 of the specifications fixed the amount of the liquidated damages at \$100 for each calendar day of delay.²

The claim for a four months' extension of time, in addition to the 70 days allowed by the contracting officer, originated in the following manner. Appellant in a letter dated November 15, 1955, requested the contracting officer to grant a six months' extension of time. The principal grounds assigned for this request were that the work of demolition had been slowed down by reason of, first, the unusual manner of construction of the Drexel Building, and, second, the extreme caution needed for protection of the historical structures and heavily traveled streets adjacent to the Drexel Building. The contracting officer denied this request by a letter dated December 7, 1955. Appellant in a letter dated December 9, 1955, reiterated its request for a six months' extension of time, assigning the same grounds as in its earlier letter, but explaining them in greater detail. The contracting officer thereupon granted a 60-day extension by a letter dated December 22, 1955. The body of this letter consisted of one sentence, reading as follows:

In response to, and following consideration of the contents of your letter of December 9, 1955, requesting an extension of time of six months relative to sub-

¹ The extensions granted before the taking of the appeal appear to have been as follows: 3 days for a labor strike, allowed July 8, 1955; 1 day for hurricane "Ione," allowed September 28, 1955; 60 days for structural conditions, allowed December 22, 1955. Subsequently, other extensions appear to have been granted, but these are not involved in the present appeal.

² The importance to the Government of timely completion of the work was also indicated by a provision in section 1-05 of the specifications which stated that: "The reputation of bidders as being skillful and successful in carrying out the work of the type and magnitude required by these specifications and the adequacy of their resources and facilities for accomplishing the work satisfactorily within the specified time, will be considered in making the award."

ject contract, please be advised that you are hereby granted an extension of time to and including March 14, 1956.³

Having thus received a 60-day extension only, appellant in a letter dated January 3, 1956, requested the contracting officer to grant an extension of four additional months. The grounds assigned were chiefly the same as those given in the letter of November 15, 1955, but mention was also made of delays caused by unusually bad weather and a labor strike. The contracting officer denied this request on January 12, 1956, and from his action in so doing the present appeal is taken.

At a pre-hearing conference before the Board in Washington, D. C., on March 27, 1956, the parties agreed that no hearing for the purpose of taking testimony would be requested, that both parties would submit affidavits in support of their respective positions, and that, when this had been done, the case of each party would be deemed to have been submitted to the Board for decision. Pursuant to this understanding the Board has received and considered affidavits from both parties.

A question that requires determination before the merits of the dispute may be examined is whether the appeal has been taken in time. Clause 6 of the General Provisions of the contract stated, in substance, that an appeal must be mailed to the contracting officer, or otherwise furnished to him, within 30 days from the date when his decision was received by the contractor. The question of timeliness arises in the present case because the appeal, while shown by the record to have been taken within 30 days after appellant had received the contracting officer's decision of January 12, 1956, appears not to have been taken until more than 30 days after the dates when appellant presumably received the contracting officer's letters of December 7 and December 22, 1955, respectively. It must be determined, therefore, whether either of those letters was such a final decision with respect to the claim for a four months' extension as would make the failure to appeal therefrom a bar to the present appeal.

³ The record contains, as indicated elsewhere in this opinion, a conflict of dates with respect to the period for which an earlier extension, the one pertaining to a labor strike, was allowed. If that extension in fact encompassed one or two days more than the nine days here attributed to it, then a later extension "to and including March 14, 1956" would encompass one or two days less than the 60 days here attributed to the extension granted by the letter of December 22, 1955. The contracting officer, however, in a letter to the Board dated March 12, 1956, and again in an affidavit dated May 2, 1956, characterizes the extension allowed by that letter as being an extension for 60 days. Appellant also consistently refers to it as being for 60 days. In the light of these circumstances the Board considers that the true intent of the letter of December 22, 1955, was to grant an extension of 60 days, in addition to all days allowed by the two earlier extensions, rather than to grant an extension to a particular day certain, viz: March 14, 1956.

⁴ Bureau order pending.

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The Board finds that this was not true of either letter. The letter of December 7, denying *in toto* the claim for a six months' extension, was, in effect, superseded by the letter of December 22, allowing that claim to the extent of 60 days. Since this supersession occurred before 30 days had passed, it is immaterial whether the December 7 letter, standing alone, would have sufficed to start running the time for appeal. A contracting officer has the authority to withdraw or change a decision during the 30 days allowed for the taking of an appeal.

The letter of December 22, in its turn, was simply a grant of a portion of the relief sought. It did not expressly deny any claim of appellant for an extension of time, contained no findings of fact with respect to the foreseeability or extent of any cause of delay asserted by appellant, and was not couched in terms signifying that a determination of a dispute under clause 6 was intended. Bearing in mind the principle that ambiguities in a document must be construed against its author, one can only conclude that the December 22 letter was not such a decision as would start running the time for appeal. In order for a decision to have that effect it must, at least, fairly and reasonably inform the contractor that a determination under the "disputes" clause is intended.⁴ The present appeal, therefore, is timely.

The general legal standards against which the merits of the claim for a four months' extension must be tested are to be found in clause 4 of the General Provisions of the contract and in paragraph (c) of clause 5.⁵ Clause 4 provided, in pertinent part, for the granting of extensions of time on account of any delays in the completion of the work that were caused by "subsurface or latent physical conditions at the site differing materially from those indicated in this contract" or by "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract." Paragraph (c) of clause 5 provided, in pertinent part, for extensions of time "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the

⁴ *Allied Contractors, Inc. v. United States*, 129 Ct. Cl. 400, 406-07 (1954); *Climatic Rainwear Co., Inc. v. United States*, 115 Ct. Cl. 520, 557-60 (1950).

⁵ Appellant has submitted no claim for additional compensation and, indeed, seems to have waived whatever rights, if any, it might have to additional compensation. The notice of appeal avers that appellant "will incur additional costs and expenses in connection with the extension it is now requesting, but it is not seeking additional recompense from the Government on that score, nor does it intend to do so at a later date." A subsequent communication from appellant states that "if the additional four months extension will be granted at this time, your petitioner (contractor) will seek no additional recompense from the Government for the additional costs and expenses which will be incurred in connection with the additional time during which the work will be completed." Still later, appellant executed a final payment voucher, dated November 16, 1956, which contains no reservation, exception, or other mention of a claim for additional compensation.

fault or negligence of the Contractor," including, but not restricted to, certain specified causes, among which were "acts of God," "acts of the Government, in either its sovereign or contractual capacity," "strikes" and "unusually severe weather." Under both of these clauses, one essential factor in determining whether a particular condition or event justifies an extension of time is the unforeseeability of that condition or event at the time when the contract was made.⁶

There is also a marked parallelism between their procedural requirements. Clause 4 stated that, should conditions of the type described in that clause be encountered, "the Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing" of the conditions encountered, and that any claim of the Contractor for an equitable adjustment on account of such a condition "shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract." Paragraph (c) of clause 5 stated that, should a delay be due to causes described in that paragraph, "the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay." While the record in the present case does not affirmatively show that written notices of all of the conditions or events upon which the request for a four months' extension is bottomed were given within the times specified in these provisions, it likewise contains no assertion by the contracting officer, the Department Counsel, or any other representative of the Government to the effect that the required notices were not timely given. In the absence of such an assertion, the Board considers that appellant was not bound to offer proof that timely notices were in fact given.

It is well settled that notice requirements of the nature of those here involved may be waived,⁷ and in the present case their waiver is expressly sanctioned by their very terms, as above quoted. If it be assumed for the sake of argument that timely notices were not given, the conclusion seems almost inescapable that the contracting officer waived the notice requirements by actually allowing an extension of 60 days, out of the six months originally requested. In any event, where compliance with a notice requirement is subject to waiver, it

⁶ *United States v. Brooks-Callaway Co.*, 318 U. S. 120 (1943); *J. D. Armstrong Co., Inc.*, 63 I. D. 289, 292-97 (1956); *L. D. Shilling Co., Inc.*, 63 I. D. 105 (1956); *Carson Construction Co.*, 62 I. D. 422, 425-29 (1955).

⁷ *Arundel Corporation v. United States*, 96 Ct. Cl. 77, 110-11 (1942); *Jack Willson*, 62 I. D. 225, 228 (1955).

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would be incongruous indeed to reject for want of proof of compliance a claim as to which the Government has not asked that compliance be proved. Nor would such a course be consistent with the spirit of the regulations governing procedure before the Board, which provide that "a statement of the Government's position" with respect to each claim asserted shall be submitted by the Department Counsel.⁸

The Board's findings with respect to each of the causes of delay asserted by appellant are set forth below in topical groupings.

I

Structural Conditions

The ground upon which appellant appears to rely most heavily in support of its claim for an extension of time is that in the course of demolishing the Drexel Building it encountered structural conditions of a nature that could not reasonably be anticipated, and that slowed down the progress of the demolition work to the extent of the full four months claimed.

The Drexel Building consisted of a central unit with four wings, arranged in the shape of an H. The whole structure rose to a height of ten stories plus an attic. The building was constructed about the year 1888 at a time when the science of skyscraper construction was in its infancy, and embodied structural features that differed importantly from those to be found in a modern office building of the same size. For example, the exterior walls were of massive stone and brick construction, many of the iron girders and beams were supported directly by the walls, most of the columns were of cast iron, and there was little or no wind bracing apart from that afforded by the walls and partitions.

The northwest wing of the building consisted in part of an earlier structure, designed for banking purposes, that was physically incorporated into the fabric of the lower stories of the newer structure. Upon the completion of the building, substantially the whole of the first four stories of this wing consisted of one large and lofty room. The upper stories were supported by four iron trusses, each framed in the shape of an A, that began at the fifth floor level and continued upward to the ninth floor level. The trusses rested on iron pilasters adjacent to the exterior walls of the wing, thus making it possible to avoid obstructing the banking space with columns.

The northeast wing of the building was designed to include accommodations for a stock exchange. The first and second floors were

⁸ 43 CFR, sec. 4.7.

column supported, and some of the columns were continued upward to support an interior gallery at the third floor level. The main stock exchange room occupied the entire second and third stories and was unobstructed by columns save for those beneath the gallery. The stories above this room were supported by four A-frame trusses, resting on pilasters adjacent to the exterior walls. These trusses were similar to those in the northwest wing, except that they began at the fourth floor level and continued upward to the eighth floor level.

The contract did not purport to describe any of the structural features of the Drexel Building. However, the National Park Service made available to appellant, before the submission of its bid, a set of some 43 drawings showing a number of the structural features of the building. With respect to these drawings, paragraph 4-03 of the specifications stated:

Prints of plans, sections and details of the building are supplemental to this set of specifications and are provided for the convenience of the contractor, but the Contracting Officer does not assume any responsibility for their accuracy.

Many of the structural conditions were, of course, determinable by visual inspection of the building, even if confined to the exposed portions of its fabric. Concerning inspection opportunities, paragraph 1-14 of the specifications had this to say:

All bidders are expected to visit the site of the work and to inform themselves as to all existing conditions. Failure to do so will in no way relieve the successful bidder from the necessity of furnishing all equipment and materials and performing all work required for the completion of the contract in conformity with the specifications. Permission to inspect the building and for opening various parts of the building to reveal structural conditions shall be obtained from the Contracting Officer.

No allowance will be made for the failure of the bidder to estimate correctly the difficulties attending the execution of the work.

Paragraph 1-05 of the specifications required each bidder to submit answers to a Planning and Performance Questionnaire, which included the inquiry "In what manner have you inspected the proposed work?" Appellant's notarized response, executed by its president on January 31, 1955, was as follows:

Personal inspection with my supervisory staff, of all floors basement, sub-basement etc. checking structure with the plans. We also checked the visible appurtenances, and the working conditions.

The contract, furthermore, did not purport to prescribe in detail the manner in which the building should be demolished. On the contrary, paragraph 3-04 of the specifications declared that:

The Contractor's procedure and methods of construction may, in general, be of his own choosing, provided that they follow general practice and are calcu-

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lated to secure results which will satisfy the requirements of these specifications and the supervision of the work.

The discretion thus accorded appellant was, however, subject to certain significant limitations, as will subsequently appear.

The arguments of both appellant and the Government revolve in large measure around the extent of the information, bearing upon the manner of construction of the Drexel Building, with which appellant should be charged in view of the provisions of the contract with respect to the drawings and the inspection. Appellant contends that the conditions encountered were unforeseen, not ascertainable by visual inspection, and unusual; the Government contends that they were conditions which should have been anticipated. A further point advanced by the Government is that the contractor failed to employ sufficient men and machinery to do the job within the contract time.

In considering these contentions account must be taken of the established principle that specification provisions dealing with such matters as Government-furnished information and bidders' opportunities for inspection are to be construed in the light of, and in harmony with, the General Provisions of the contract. Statements in the specifications to the effect that Government-furnished information is not guaranteed, or that bidders are expected to inform themselves of all existing conditions, or that failure to estimate correctly the difficulties attending the execution of the work will not be a basis for relief, or other expressions of like tenor, supplement the General Provisions, but do not supersede or override them. Thus, it has been frequently held that relief for "changed conditions" is to be granted if the condition is one that fairly meets the standards prescribed by Clause 4, notwithstanding the presence of specification provisions such as those just mentioned.⁹

Since the structural conditions here involved existed when the contract was made, they fall into the category of "changed conditions" under clause 4, rather than into the category of "excusable causes of delay" under paragraph (c) of clause 5.¹⁰ Under neither clause, however, would appellant be entitled to an extension of time on account of conditions that in the exercise of ordinary prudence should reason-

⁹ *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 650-57, 665-66, 717-18 (1955); *General Casualty Co. v. United States*, 130 Ct. Cl. 520, 527-32 (1955), cert. denied, 349 U. S. 938 (1955); *Shepherd v. United States*, 125 Ct. Cl. 724, 736-38, 751-70 (1953); see *Ohernus v. United States*, 110 Ct. Cl. 264, 266-67 (1948).

¹⁰ The latter category has been held to comprehend only those situations where the event that causes the delay occurs after the making of the contract, *Morrison-Knudsen Co., Inc.*, 60 I. D. 479, 483 (1951).

ably have been anticipated. It may not be granted relief for conditions that were indicated in the drawings furnished it by the Government, or for conditions that could have been ascertained through an inspection of the scope called for by the contract. Nor may it be granted relief for conditions that, in the words of clause 4, are of a type "ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract," even though such conditions may not have been indicated in the drawings or ascertainable by visual inspection. Conversely, appellant was not bound to foresee conditions that were truly unusual and about which it had no information or reasonable means of obtaining information.¹¹

In order to apply these standards properly, it is important to ascertain what information the set of 43 drawings contained, and what information the drawings did not contain. It is, however, also important to bear in mind not only the admonition in the contract that the drawings were not guaranteed, but also the fact that the drawings themselves, as will be shown, obviously fell far short of being a complete description of the structural features of the building to be demolished.

A number of the 43 drawings appear to be a part of the original plans for the Drexel Building. These drawings shed considerable light on many structural features of the building that were not readily ascertainable by visual inspection. Nevertheless, they do not reveal all of the hidden structural conditions that are claimed by appellant to have slowed down its work. For one thing, the entire omission of certain salient features, such as an elevation of the front of the building, makes it questionable whether these drawings are a complete set of the original ones. For another, they were not accompanied by the original specifications which, if written in the customary manner, would have included much structural information that would not have been repeated in the drawings.

Certain departures from the original plans appear to have been made during the course of the construction of the building. Thus, a number of ninth story windows which are indicated in the original drawings as having arched tops were actually constructed with flat stone lintels. Again, a whole tier of rooms not indicated in the original plans was provided by shortening the length of the court between the northwest and northeast wings.

¹¹ Illustrations of situations that involved analysis of the foreseeability of structural conditions in existing buildings for the purpose of determining whether the contractor had encountered "changed conditions" are to be found in *Mayfair Construction Co.*, Eng. C & A No. 788 (Aug. 23, 1955); *Fine*, Eng. C & A No. 417 (Dec. 7, 1953); *Coleman Floor Co.*, ASBCA No. 831 (Sept. 10, 1951).

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Some time after the construction of the Drexel Building the lower portions of the northwest and northeast wings were extensively remodeled. In the former, the lofty banking room was subdivided horizontally into three separate stories, and columns, as well as beams and girders, were introduced to support the two new floors added in this process. In the latter, the main stock exchange room was subdivided horizontally into two separate stories by converting the interior gallery into a full floor, and in this process new columns, beams and girders were likewise introduced. The drawings furnished the contractor include two that deal with the remodeling of the northwest wing, but these give only a rather fragmentary picture of the changes made. None of the drawings reveals the structural details of the remodeling in the northeast wing.

Another pertinent consideration in evaluating the information available to appellant at the time when its bid was submitted is that the drawings could not, in any event, reasonably be expected to reveal all of the physical conditions that might affect the progress of the demolition. For example, they obviously would not reveal defects that were due to shoddy workmanship rather than to faulty design. Nor would they reveal defects arising, after the building had been completed, from such causes as wind stresses, vibration, rain damage, rust, temperature changes, or ordinary wear and tear. The extent to which defects of these types should have been anticipated is a matter as to which the drawings plainly have no relevance at all.

The documents submitted by appellant enumerate a number of structural conditions which appellant says it could not have been expected to foresee, either on the basis of the drawings or on the basis of its inspection of the building. These conditions are analyzed seriatim in the following paragraphs:

1. *Defective connections in ironwork of lower stories of northeast wing.* The plan of demolition adopted by appellant and approved by the National Park Service contemplated that during the period while the truss-supported stories of the northeast wing were being removed, the trusses would be temporarily supported by shoring built up from the columns, girders and beams of the lower stories. However, when enough of the interior finish of the building had been stripped away to reveal the condition of the ironwork in the lower stories, various incomplete or faulty connections between the columns, beams and girders were disclosed. These connections had to be stiffened by welding and other measures before the work of shoring could go ahead. The amount of stiffening required was greater than

appellant could have reasonably anticipated because, first, the nature of the ironwork that had been installed in the course of converting the stock exchange gallery to a full floor was not shown by any of the drawings, and, second, defects had developed in some of the first, second and third story ironwork that could be found only by tearing out the interior finish around each connection.

2. *Concealed woodwork in lower stories of northwest wing.* Appellant's plan of demolition contemplated that the temporary shoring needed in the northwest wing while the truss-supported stories of that wing were being removed would be built up, not from the ironwork installed when the former bank space was remodeled, but from the roof beams of the old bank building itself. These beams had been left in place when the Drexel Building was superimposed upon the bank building in 1888, and occupied the space that would have otherwise constituted the fourth floor of the remodeled northwest wing. Appellant contends that the work of building the shoring was delayed by reason of the unexpected discovery of what is described, at one place, as "a concealed through of wood covering the steel plates spanning the two plate girders supporting the old roof," and, at another place, as "wooden superstructure under steel." No information concerning the presence or absence of woodwork in the vicinity of the old roof beams was given by the drawings. The Drexel Building ostensibly was a fireproof structure, and the placing of woodwork in contact with structural ironwork is contrary to long-established principles of fireproof construction.

3. *Unusually large stones in the cornices, capital heads, and pilasters.* The masonry of the Drexel Building was of a monumental character that involved the use of large ashlar-cut stones. The cornice stones, in particular, frequently measured ten feet in their longest dimension. For the most part, however, these were conditions that could have been determined in advance of the bidding. The height and width of each stone were readily ascertainable by visual inspection. The depth of the cornice stones could have been ascertained from the drawings, which indicated that both the attic and the tenth story cornices were composed of stones than ran through the entire width of the walls, and that projected outwards to or beyond their centers of gravity. While the depth of the stones composing the capital heads and pilasters was not revealed by the drawings, the presence of stones of unusual depth at many places in the walls, as indicated by the drawings, should have put appellant on notice that the capital heads and pilasters were apt to be composed of such stones.

4. *Absence of cornice stone anchors.* The cornice stones were held in place only by the weight of the courses of masonry above them,

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and were not equipped with anchors or other devices that would prevent them from falling once those courses had been removed. This condition was not shown on the drawings and was not ascertainable by visual inspection. It was not a method of construction that could reasonably have been anticipated in a building which appeared to have been constructed in accordance with the highest standards of its time, and the masonry of which was of such a monumental type as that found in the Drexel Building.

5. *Flat lintels above ninth story windows.* Many of the ninth story windows had flat stone lintels instead of the arched tops indicated in the drawings. This, however, was a condition which would have been obvious upon even a cursory examination of the exterior of the building.

6. *Bolting of ninth story window lintels to I-beams.* Appellant attributes much of the delay in demolishing the ninth story to the fact that the flat window lintels were held in place by I-beams to which the lintels were bolted. This condition seemingly was not ascertainable by visual inspection and the drawings contained nothing to suggest that it existed. It was an unusual method of construction that would hardly have been foreseen.

7. *Cast iron columns with two-bolt shelf and two-bolt clip connections.* The drawings indicated that cast iron columns with this type of connections were to be found throughout the southwest and southeast wings. Hence, weakness of the floors in those wings, insofar as attributable to either the materials of the columns or the design of the connections, was determinable in advance.

8. *Friction or gravity connections.* The drawings appear to provide for girders bearing on columns or columns bearing on girders, without the use of bolts or other devices to connect the one to the other, in certain portions of the building, notably the top two stories of the northwest wing and the top three stories of the northeast wing. Hence, weakness of the floors in those areas, in so far as attributable to dependence upon friction or gravity as the means of connection of some members of the structural ironwork, was determinable in advance.

It does not appear that the inspection of the Drexel Building which appellant made before submitting its bid went beyond a visual examination of the surface or exposed portions of its fabric. Paragraph 1-14 of the specifications, which provided for the inspection, did not expressly require that bidders tear out interior finishing, bore into the walls, or otherwise explore for concealed structural features. While this paragraph included a statement that permission for "opening various parts of the building to reveal structural conditions" should be

obtained from the contracting officer, this statement on its face was permissive rather than mandatory. The fair construction of the paragraph as a whole, particularly when read in the light of clause 4 of the General Provisions, is that it contemplated the making of such an inspection, and only such an inspection, as a prudent bidder could reasonably be expected to make in the circumstances here involved. Considering the size of the Drexel Building, the massiveness of its construction, and the variety of its structural details, the Board is persuaded that a structural exploration of the type that would have been necessary to reveal such hidden conditions as those described in paragraphs 1, 2, 4 and 6 is more than could reasonably have been expected of a prudent bidder, and was not required by the contract.

The contracting officer did not particularize, either in his decision of January 12, 1956, or in his letter of December 22, 1955, the causes of delay on which the 60-day extension allowed by that letter was predicated. However, in an affidavit dated May 2, 1956, the contracting officer related the 60-day extension to the portion of the demolition job which involved the preparations for removal of the trusses in the northeast and northwest wings, that is, to the portion of the job which was slowed down by the conditions described above in paragraphs 1 and 2.¹²

The Board considers that the conditions described in these paragraphs constituted unknown physical conditions, of an unusual nature, that differed materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract, and that the contracting officer was right in granting an extension of time with respect to the work affected by them. The

¹² The relevant portion of the affidavit reads as follows:

"The six month period between early July and early December, 1955, embraced the period wherein the basic and significant preparation for and accomplishment of demolition work involving these trusses took place. Inspections conducted by the Contracting Officer and his representatives of this work, particularly relating to preparatory measures exercised, such as shoring, indicated that the Chief Engineer and Superintendent for the Contractor employed unusually careful and thorough measures for dealing with this hazardous phase of the work. Recognition of this was taken into account by the Contracting Officer in granting the sixty-days extension on December 22, 1955, in response to the Contractor's request of December 9, 1955. While an exact computation of the additional time used by the Contractor's representative to deal with this problem in the manner stated, was considered not to be determinable, it was the judgment and conclusion of the Contracting Officer, in accordance with Section 5 (a) of the General Provisions of the contract, that the unusual precautionary and thorough measures employed provided a condition of safety and security which not only was in the interest of the Government, but required additional time on the part of the Contractor to execute. It was the judgment of the Contracting Officer that, within the total six months period involving the significant phase of this work related to the 'A' frame trusses, sixty days was a fair estimate of the additional time utilized by the Contractor's representative to perform the work in the careful and secure manner observed and described."

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period of 60 days allowed by the contracting officer is only three days shorter than the period of nine weeks which appellant avers to have been the amount of time lost in connection with the preparations for dismantling the trusses. Since the record contains no proof which would warrant the Board in finding that the time lost by reason of these conditions was either greater or less than 60 days, the decision of the contracting officer as to this facet of the case must stand.

With respect to the conditions described in paragraphs 3, 4, 5 and 6, the gravamen of appellant's complaint is that the size of the stones, and the modes by which they were held in place, delayed the demolition operations by compelling extensive shoring of the cornices and lintels, cautious and tedious removal of the individual stones from the walls, splitting of the larger ones into pieces, and dependence upon manpower rather than machinery. With respect to the conditions described in paragraphs 7 and 8, appellant contends that the weakness of the floors attributable to these conditions further delayed the demolition operations by necessitating reinforcement of the floors with planking in order to carry the weight of the stones, and by precluding the use of machinery.

The Board considers that conditions 3, 5, 7 and 8 were foreseeable ones and do not justify an extension of time. It considers, on the other hand, that conditions 4 and 6 were unknown physical conditions, of an unusual nature, that differed materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract, and do justify an extension of time. Inasmuch as the contracting officer has particularized the 60-day extension as having been granted on account of the portion of the job that involved conditions 1 and 2, it follows that appellant is now entitled to a further extension, commensurate with the delays encountered on account of conditions 4 and 6.¹³

The delays attributable to these two conditions were, however, concurrent with others which are not excusable. It seems clear that a

¹³ Both the specification provisions and the factual situation involved in the present case are similar in many respects to those involved in *Bryne & Forward v. United States*, 85 Ct. Cl. 536 (1937), a case in which the Court of Claims denied a contractor relief on account of alleged unforeseen conditions that delayed the progress of a wrecking job. There are, however, two essential dissimilarities, each of which is so fundamental as to preclude the decision in that case from being regarded as an applicable precedent. In the first place, the contract there involved appears to have contained no "changed conditions" provision comparable to clause 4 of the contract here involved. In the second place, the court did not have before it in that case the question of whether the contractor was entitled to an extension of time for delays that were the direct result of the alleged unforeseen conditions, since an extension of time equivalent to those delays had already been granted administratively, but rather had before it the issues of whether the contractor was entitled to an extension of time for delays that were only remotely and indirectly connected with the unforeseen conditions, and to an allowance of money damages for the increased expenses that had been incurred as a result of those conditions, neither of which issues are raised by the present appeal.

substantial part of the slowing down of the masonry removal work was due to appellant's own failure to estimate correctly the difficulties inherent in the demolition of a building that possessed the known or expectable characteristics of the Drexel Building, and to put on the job enough skilled personnel to overcome those difficulties. Thus, appellant's chief engineer reported to appellant's president during the progress of the work that one reason why it had been slowed down was because of a lack of workmen and foremen who could handle a job of this type without constant immediate supervision by the chief engineer. He said:

Various times I have tried to augment the crew by increasing the number and working at various points. The drawback is that the men available are not experienced enough to know what is safe and what is unsafe. That is, men who can work on a wall. (I have had four foremen who have been sent to me, thus far only one is of any account. They must be watched at all times. In plain words, their experience runs along a structural concrete job that can be pounded to pieces leaving a steel skeleton still standing. This does not include our new man * * *.)

Under the contract it was appellant's responsibility to solve the technical problems incident to the demolition of the building, even though they may have been of a novel character, and to provide competent foremen and workmen in sufficient numbers to complete the job, barring unforeseeable conditions or events, within the 270 days specified in the contract. It cannot excuse its failure to perform on time merely on the ground that it did not have enough employees with the requisite amount of "know-how" to do the job it had contracted to do.¹⁴ Yet, at the same time, the record does not bear out the contention of the Government that this deficiency was the sole cause of the delays.

Because of the concurrent nature of the various causes of delay it would be impossible to make a precise determination of the amount of time lost on account of conditions 4 and 6. However, the evidence of record is sufficient to admit of the amount being approximated with enough certainty to meet the standards of proof that have been judicially approved in comparable situations.¹⁵

¹⁴ *Carnegie Steel Co. v. United States*, 240 U. S. 156 (1916); *Poloron Products, Inc. v. United States*, 126 Ct. Cl. 816, 826-28 (1953); *S. J. Groves & Sons Co.*, 62 I. D. 145 (1955); *Triangle Glove Co., Inc.*, ASBCA No. 544 (May 31, 1950); see *Pelton Water Wheel Co.*, 62 I. D. 385, 392-93 (1955); *John Andresen & Co., Inc.*, ASBCA No. 633 (Dec. 13, 1950). In *Triangle Glove Co., Inc.*, *supra*, it was said that: "In entering into a contract with the Government the contracting party is presumed to possess the know-how and the facilities to complete the contract subject only to relief from performance because of unforeseeable conditions which may arise."

¹⁵ *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 689-97 (1955); *Chalender v. United States*, 127 Ct. Cl. 557, 564-66 (1954); *Shepherd v. United States*, 125 Ct. Cl. 724, 738-40 (1953); see *Lincoln Industries, Inc.*, ASBCA No. 334 (March 15, 1951).

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From the photographs and data submitted by the parties, it appears that removal of the coping stones of the parapet began on or about May 13, 1955, and that demolition of the ninth story was completed on or about October 31, 1955. During this period of 171 days those portions of the building that involved the most difficult problems of masonry removal, such as the attic and tenth story cornices and the ninth story window lintels, were demolished. Any masonry removal delays, due to unforeseeable circumstances, that were subsequently encountered would appear to have been substantially concurrent with the delays on account of which the 60-day extension was granted. The 171 days included, moreover, 10 that are allowed for elsewhere.¹⁶ Of the remaining 161 days, substantial portions would necessarily have been consumed in dismantling the attic and the two stories beneath it even under optimum circumstances; other portions were unnecessarily lost by reason of conditions 3, 5, 7 and 8 and by reason of the insufficient crew employed; and still others were partially concurrent with the delays allowed for by the 60-day extension. Combined, these factors account, in the judgment of the Board, for at least two-thirds of the time consumed during the 161 days in question. In the light of the foregoing, and on the record as a whole, the Board finds that 50 calendar days is a fair approximation of the delays attributable to conditions 4 and 6, and that appellant, accordingly, is entitled to an extension of time on account of those delays in the amount of 50 calendar days.

II

Safety Conditions

A further major consideration urged by appellant in support of its request for a four months' extension of time is that progress on the job was retarded by reason of the need for exercising the utmost in safety precautions to avoid injuring adjacent historic buildings and users of adjacent streets. Three sides of the Drexel Building abutted immediately on public streets, two of which were subject to constant heavy travel. Directly across one of these streets were the Old City Hall and American Philosophical Society buildings, both structures of national historic significance. The fourth side of the building abutted on a narrow court, directly across which was a third structure of national historic significance, the Old Custom House or Second Bank of the United States building. All three of these edifices form a part of the Independence National Historical Park Project, advance-

¹⁶ These 10 days are covered by the extensions of time allowed by the contracting officer on account of a labor strike and hurricane "Ione."

ment of which was the purpose motivating demolition of the Drexel Building.

In developing this consideration appellant states that the demolition work proceeded slowly because hand labor, rather than machinery, had to be used in order to minimize the danger that sections of the walls might fall into the streets or upon the historic buildings. At places appellant implies that the decision to use hand labor was a voluntary one, brought about by appellant's own recognition of the need for protective measures. On the other hand, appellant also urges that the use of hand labor was required of it by superior authority, stating in its affidavit of April 21, 1956, that:

Roy Ridge, Chief of the Bureau of Building Inspection of the City of Philadelphia, who is familiar with the construction of the Drexel Building, made an inspection of the building and the method being used by your petitioner to demolish the building and instructed us that we were **POSITIVELY NOT TO USE MACHINERY**, but only manual labor in all our efforts above the fifth floor, because it was his considered opinion that the floors were not sturdy enough to stand a live load.

A reading of the contract makes it plain beyond question that the safeguarding of the historic structures in particular, and of persons and property in general, was one of the prime requirements to which all of appellant's operations were expected to conform. The specifications were prefaced by an "Introduction," which read as follows:

This building which is to be demolished is within the area known as Independence National Historical Park Project. On the west side of Fifth Street are the Old City Hall and American Philosophical Society buildings. To the east, separated by a narrow court, is the Old Custom House. These buildings must be protected from any possible defacing and structural damage.¹⁷

Paragraph 5-01 of the specifications, which defined the scope of the work to be done, commenced with this statement:

The Drexel Building is in close proximity to several historic structures: the Old City Hall and Philosophical Buildings on the west side of Fifth Street, and the Old Custom House separated from it by a narrow court on the east. Every precaution shall be taken to prevent any damage to these buildings. Any damage to these buildings shall be repaired under the supervision of and to the satisfaction of the Contracting Officer, in accordance with Section III, paragraph 3-06, Restoration.¹⁸

Paragraph 1-17 of the specifications further provided that:

The Contractor shall be responsible for the safety of his employees, plant, and material, and for any injury or damage done to or by them from any source or cause. He shall save and hold the United States free from all claims for dam-

¹⁷ This provision was tied into the body of the specifications by the following statement in paragraph 4-01: "Attention is invited to the Introduction which concerns the protection and preservation of the important historic structures adjoining the site of operations."

¹⁸ The relevant portion of paragraph 3-06 was as follows: "The Contractor will be required to repair at his own expense, all damage done to Government and private property by or because of his work under the contract."

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ages to any and all persons and (or) property arising from the execution of the work covered by these specifications.

The Contractor shall make good at his own expense all damage to any property of the United States arising from his operations under these specifications, or from the fault or neglect of any of his employees.

The contract also contained certain specific limitations upon the manner in which the building might be dismantled. Subparagraphs G, H and J of paragraph 5-04 declared:

G. Masonry walls shall be demolished in small sections (unless other means of demolition shall have first been approved by the Contracting Officer), as no piece larger than one (1) square foot in area and six (6) inches thick will be permitted in the backfilling of the subsurface spaces.

H. No portions of walls above the elevation of the first floor and located immediately adjacent and parallel to Chestnut, Fifth and Library Streets and Custom House Court shall be "thrown," but shall be barred loose and demolished piecemeal.

J. Window and door frames shall not be removed until the demolition work shall have progressed to their elevation in the walls.

Paragraph 1-10 provided that:

The Contractor shall so conduct his operations as not to interfere with the ordinary use of the streets, sidewalks, and other utilities.

While these specific limitations would not, of their own force, have entirely precluded the utilization of machinery for demolition purposes, nevertheless, as a practical matter, they limited the opportunities for its profitable employment.

Finally, the contract made it very clear that appellant would have to abide by all lawfully-imposed municipal restrictions upon the manner in which the work might be done. Subparagraphs A, B and E of paragraph 5-02 were as follows:

A. This demolition and removal shall be prosecuted in strict accordance with the covenants, terms, and conditions in this contract, as well as with all rules, regulations, codes, and laws, both State and municipal, which govern such operations.

B. Before proceeding with this contract, the Contractor shall secure all necessary permits for the prosecution of the work at hand, and any fees necessary for such permits shall be paid by the Contractor.

* * * * *

E. All operations under this contract pertaining to the demolition of buildings, removal of materials and equipment, backfilling, etc., shall conform to all rules and regulations, both State and municipal.

In view of the foregoing express provisions of the contract, the Board considers that the need for taking safety precautions, on account of the close proximity of the Drexel Building to important historic structures and heavily traveled thoroughfares, was not in and of itself an excusable cause of delay. For like reasons, the Board

considers that the ban upon the use of machinery above the fifth floor, imposed by the Chief of the Bureau of Building Inspection of the City of Philadelphia and predicated upon the weakness of the floors, was not in and of itself an excusable cause of delay.

In so far as either the need for safety precautions or the municipally-imposed ban upon the use of machinery may have been due to unforeseeable structural conditions, the Board has made allowance for the taking of those precautions and the effects of that ban, in determining the duration of the extension of time to which appellant is entitled by reason of the unforeseeable structural conditions themselves. Except to the extent so allowed for, there is no merit to the claim for an extension of time because of the utilization of hand labor, irrespective of whether such utilization was voluntary or compelled by the city authorities.

III

Other Conditions

The notice of appeal includes allegations that time was also lost by reason of the four conditions discussed below.

1. *Change in outrigger construction.* Five working days are alleged to have been lost because representatives of the National Park Service ordered appellant to change the location of an outrigger, "for safety purposes not previously disclosed," by moving the outrigger from the eighth to the ninth story of the building. The Government contends that appellant had been duly instructed to place the outrigger at the ninth story level before work on it had been begun.

An extension of time on account of the change in the location of the outrigger may not be allowed by the Board for at least two reasons. First, appellant has submitted no proof to show that the initial placement of the outrigger at the eight story level was proper or, if improper, was due to a mistake made by representatives of the Government. Second, this ground for a time extension was not presented to or passed upon by the contracting officer in connection with the decision appealed from, and, therefore, is beyond the jurisdiction of the Board to consider on the present record.¹⁹

2. *Labor strike.* On or about June 28, 1955, appellant requested the contracting officer to grant an extension of time because of a strike affecting the demolition job, and on or about July 8, 1955, the contracting officer granted an extension of time on account of the strike. The extension appears to have encompassed a period of nine days, beginning on June 28 and ending on July 6, and the contracting offi-

¹⁹ *Urban Plumbing and Heating Co.*, 63 I. D. 381, 382-84 (1956); *Gila Construction Co., Inc.*, 63 I. D. 378 (1956).

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cer states that an inspection of the work on July 7 revealed that a normal work program was again in process.²⁰ On the other hand, appellant claims that 27 days were lost as a direct result of the strike.

The burden of proving that the strike delayed the progress of the work for a longer period than that allowed by the contracting officer is a burden that rested upon appellant. This burden it has not borne, for no evidence at all has been submitted to the Board with respect to the question here at issue. Moreover, if the strike actually began on June 28 and if work was actually resumed with a normal crew on July 7, it would seem that nine days was the proper period. It follows that the claim for a further extension of time on account of the strike must be denied.

3. *Oppressive heat.* Twenty-three working days are alleged to have been lost during the summer of 1955 because of the refusal of appellant's men to work on the roof of the building, in the direct rays of the sun, on days when oppressive heat prevailed. In support of this contention appellant submitted a tabulation of official weather data showing that in the summer of 1955, up to August 3, temperatures of 90 degrees and over were recorded in the Philadelphia area on 23 days, including one day on which the temperature reached 100 degrees. The answer of the Government to this line of argument is that the oppressive heat encountered did not exceed the average weather conditions reasonably to be expected in Philadelphia during the summertime, and, therefore, should have been foreseen.

The causes of delay enumerated in paragraph (c) of clause 5 include "unusually severe weather." It is well settled, however, that this term does not include any and all weather which prevents work under a contract, but means only weather surpassing in severity the weather usually encountered or reasonably to be expected in the particular locality during the time of year involved.²¹ In the instant case appellant has submitted no evidence to show that the 23 days when the temperature reached 90 degrees or over were more than the number of such days experienced during an average Philadelphia summer, or that the heat on those days was more oppressive than reasonably could have been expected in the light of the weather conditions usually prevailing in Philadelphia at that time of the year. Hence the claim for an extension of time on account of oppressive heat must be denied for want of proof.

²⁰ The record does not contain the document by which the extension was allowed, and the statements made concerning its duration are conflicting. While the most logical assumption from the record is that the extension was for 9 days, it is possible that it may have been for 10 or 11. The comments and directions in this opinion are not intended to deny appellant the benefit of the additional one or two days, if, in fact, they were included in the extension allowed by the contracting officer.

²¹ *Jeneckes*, 62 I. D. 449 (1955), and authorities there cited.

4. *Hurricane "Ione."* In September, 1955, progress of the work was delayed by the major storm known as hurricane "Ione." The contracting officer granted an extension of one day to cover the time lost by reason of this storm. Appellant claims that six working days were actually lost and should have been allowed.

With respect to this claim, as in the case of some of the preceding ones, appellant has made no attempt to prove facts that would justify allowance of the requested relief. Its mere assertion that the time lost by reason of hurricane "Ione" was greater than the time allowed by the contracting officer is not enough. Appellant had the burden of proving that the contracting officer erred in determining the extent to which the progress of the demolition job was delayed by the storm. As it has not borne this burden, its claim for an additional extension of time on account of hurricane "Ione" is denied.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the contracting officer is directed to issue an appropriate order extending the time for performance of the contract by 50 calendar days, in addition to the extensions of time otherwise allowed by him, and the decision of the contracting officer denying the claim for a four months' extension of time, as modified by the foregoing direction, is affirmed.

HERBERT J. SLAUGHTER, *Member.*

I concur:

THEODORE H. HAAS, *Chairman.*

Mr. Seagle, *dissenting:*

I cannot for many reasons agree with the decision of the majority of the Board, in so far as it allows the appellant an extension of time of 50 days by reason of the discovery of "changed conditions" in the demolition of the Drexel Building. Indeed, it seems to me that the majority has gone to extraordinary lengths to afford relief to the contractor from the assessment of liquidated damages in this case, and I believe that its action will tend to compromise and undermine not only the substantive principles, but also the basic requirements of procedure and proof that should govern in such cases.

The majority opinion does not reflect adequately the realities of the record before the Board. The fact is that the appellant has not sought relief either from the contracting officer or the Board under the "changed conditions" clause (clause 4) of the General Provisions of the

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contract. It invoked rather the "delays-damages" clause (clause 5) of these provisions.¹ Responding to the importunities of the contractor, the contracting officer granted an extension of time of 60 days for the completion of the work to satisfy its demand for a six months' extension of time.² It is not without significance that the contracting officer did not originally give any reason for his action. In fact, the extension of time was granted by him for a reason which was hardly proper under the express terms of the contract. At the conference of March 27, 1956, before the Board, the contracting officer made this quite clear when he stated that he had given the contractor the 60 days as "a matter of grace," and to forestall it from "closing down the job."³ Subsequently, the contracting officer was asked to file an affidavit, and in this document he sought to supply an aura of propriety for his action by stating that the extension of time had been granted as a sort of reward for doing the shoring in an exceptionally careful and thorough manner. But whether the extension of time was a matter of grace or a reward, it had no proper basis in the delays-damages clause. Indeed, the inapplicability of the clause is recognized in the majority opinion, although in a manner that is both odd and obscure. The majority has been compelled to hold, as is obvious, that the "delays-damages" clause, which provides that a contractor "shall not be charged with liquidated or actual damages * * * because of any delays in the completion of the work due to *unforeseeable* causes beyond the control and without the fault or negligence of the Contractor * * *," refers to events in the future, and cannot, therefore, encompass conditions already in existence at the time the contract was made. Instead of denying relief on this ground—indeed the Board might have even canceled the extension of time of 60 days granted by the contracting officer⁴—the majority has proceeded on its own initiative to perform plastic surgery on the appellant's case, and has transformed it from a request for the cancellation of liquidated damages based on the

¹ Thus, in its letter of December 9, 1955, the appellant stated in the first numbered paragraph thereof: "The contract calls for the completion, on or before January 4, 1956, but provides for extensions as shall be granted in accordance with the General Provisions (Article 5th of said contract), which states that the contractor shall not be charged with liquidated or actual damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault of the contractor, etc." After citing "a few unforeseeable conditions encountered," the appellant reiterated: "The above specific illustrations are just a few of the many unforeseeable causes and conditions found which were beyond our control, totally unexpected and without any fault or negligence on our part."

² This demand was made by the appellant while the work was still in progress, and before it even knew, therefore, how long a time would be required to complete it.

³ See Transcript of the Conference, pp. 10 and 11.

⁴ In the appeal of *Jeneckes*, 62 I. D. 449, 453 (1955), the Board held that "an appeal opens up the entire record, and that it may, therefore, disallow an extension of time granted by a contracting officer."

"delays-damages" clause into a claim for an extension of time by way of equitable adjustment under the "changed conditions" clause.

To be sure, the Board has recognized in a dictum that it "is not necessarily precluded from deciding a claim upon a theory not advanced by the parties," if the theory is consistent with the facts of record.⁵ But, surely, this should be done with extreme caution, and it is hardly proper in a case in which the record is unsatisfactory, the applicable legal principles are at best doubtful, and the consequence may be that a foundation will be laid for a claim to additional compensation from the Government, although the Government has not had an opportunity to be heard.

The majority is aware that there is a procedural obstacle to the application of the "changed conditions" clause in this case. I cannot agree, however, that this obstacle, which is formidable, has been overcome. It does not help matters at all to point out that there is a "marked parallelism" between the procedural requirements of the "changed conditions" and the "delays-damages" clauses of the contract. As a matter of fact, the procedural requirements are somewhat different, since the "changed conditions" clause requires the contracting officer to be notified promptly before the conditions are disturbed while the "delays-damages" clause requires that the contracting officer be notified of a cause of delay within ten days of its occurrence. In any event, the nature of each of two parallel lines is in no wise affected by the fact that they are parallel. The two real questions—if there can be said to be any real questions in this rather nebulous aspect of the case—are whether the required notice of either the occurrence of unforeseeable causes of delay or of the discovery of changed conditions was in fact given, and whether notice in the one case and the action of the contracting officer with respect to the notice can be carried over from the one situation to the other.

So far as the first question is concerned, it is an undoubted fact, rather than a mere assumption "for the sake of argument" that the appellant did not notify the contracting officer either promptly or within ten days of either the occurrence of unforeseeable causes of delay or of the discovery of changed conditions. It is apparent from the appellant's letter of November 15, 1955, that this was its *first* request for an extension of time based on difficulties in the demolition of the building, and it is clear that the date of the letter is many months *after* the work of demolition had begun. Thus, the appellant stated in the opening paragraph of the letter:

⁵ See *Paul C. Helmick Company* (on request for reconsideration), 63 I. D. 363, 365-66 (1956). In this case, however, the theory upon which the case was decided was actually advanced by the parties.

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We find that, *after several months of operations*, our estimated time to demolish this building is short of the time required to complete the job due to the fact that this building was one of the first attempts at "Skyscraper" construction incorporating the use of masonry walls throughout.

And if there is any earlier letter, the Board could easily have ascertained whether this is so by addressing an inquiry to the contracting officer.⁶ As, under the terms of the contract, any notice had to be given, *in writing*, moreover, any oral notice would have to be disregarded.

Having disposed of the notice requirements by exempting the appellant from proving that they were in fact given, the majority theorizes that they were in fact waived by the contracting officer "by actually allowing an extension of 60 days, out of the six months originally requested." Now, it is undoubtedly true that it has been held that a contracting officer waives notice or protest requirements by considering a claim on the merits but in the very case cited in the majority opinion, namely *Arundel Corporation v. United States*, 96 Ct. Cl. 77, the Court of Claims made it clear that the rule is not mechanical but subject to important qualifications. The court, after stating the general rule of waiver, added "but, of course, a waiver cannot be implied if there is an express statement that the provision for protest is not being waived, or if there were other facts in the case to rebut the implication of a waiver arising from the consideration of the claims on the merits." Applying this doctrine, this Board has held that a protest requirement was not waived by the contracting officer when he merely expressed an opinion on a question of law involved in the claim;⁷ or when the contracting officer expressed an opinion on the merits at a time when he was under the impression that the claim had been withdrawn;⁸ or—most significantly of all for present purposes—when the contracting officer had made no comment at all on the particular claim.⁹

This is, indeed, the hub of the present case. A waiver cannot be extracted out of silence. By speaking of the notice requirements in the plural, and of the contractor's claim for a four months' extension of time in the singular, the majority opinion creates the impression that what is involved is a single claim which the contracting officer considered on the merits but granted only in part, thus waiving the

⁶ Section 4.6 (c) of the Board's regulations requires that the "correspondence and other data material to the appeal" be included by the contracting officer in the appeal file but the record shows that certain letters relating to extensions of time have not been included.

⁷ *R. P. Shea Company*, 62 I. D. 456, 462 (1955).

⁸ *J. D. Armstrong Co., Inc.*, 63 I. D. 289, 317 (1956).

⁹ *Carl W. Pistor*, IBCA-81 (Dec. 27, 1956).

procedural requirement. Actually, the appellant's claim for an extension of time was based on diverse claims, which involved not only various structural conditions but also the location of the site of the building, and various abnormal weather conditions. The contracting officer did not consider any of these claims on the merits in his original decision. Indeed, even the 60 days' extension of time which he granted was not, as has already been pointed out, based upon a true consideration of the merits. It was only when *the stage of proof* was reached after the appeal had been received by the Board that the contracting officer made any comments at all on the various claims of the contractor in an affidavit filed with the Board in reply to the appellant's affidavit. In this affidavit the general procedure of the contracting officer was to reject the appellant's claims by citing some provision of the specifications which, in his opinion, constituted a bar to their consideration. These comments amount, of course, only to expressions of opinion on questions of law. Even if they are to be regarded as amendments to his original decision, the fact remains that the allowance of one of the contractor's claims was not a waiver on the merits with respect to the other claims.¹⁰

If I am correct in insisting that a waiver cannot be implied from the silence of the contracting officer in considering the claims of the contractor based on the "delays-damages" clause, the transformation of the claims into ones based on the "changed conditions" clause, makes the silence even more intense. It is this silence that lends such an air of unreality to the discussion of the procedural problem in the majority opinion. How could the contracting officer, or the Department Counsel, or any other representative of the Government make any assertion that the required notice was or was not timely given, or waived with respect to a claim that was never advanced? It may be incongruous, indeed, as the majority says, to reject for want of proof of compliance a claim as to which the Government has not asked that compliance be proved, in a case in which the nature of the claim has not been altered. But surely it is even more incongruous to assume compliance or waiver with respect to a claim that was never argued, and to allow a claim of which the Government was never aware.

As a matter of fact, while this incongruity is not openly acknowledged in the majority opinion, it is really there, for how otherwise can there be explained the determined effort made in the opinion to make it appear that the "changed conditions" clause and the "delays-damages" clause are a pair of Siamese twins? We have already been

¹⁰ See *Porcelain Products, Inc.*, CA-144 (Jan. 16, 1952).

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told about "the marked parallelism between their procedural requirements," but it seems that the parallelism is no less marked in their substantive requirements. Under both of these clauses, we are further told, "one essential factor in determining whether a particular condition or event justifies an extension of time is the unforeseeability of that condition or event at the time the contract was made."¹¹ And, again, we are told: "Under neither clause, however, would appellant be entitled to an extension of time on account of conditions that in the exercise of ordinary prudence should reasonably have been anticipated." Even assuming that foreseeability is an identical factor in the interpretation of both clauses, there are other factors in each of the clauses that are not identical. A cause of delay under the "delays-damages" clause must be not only "unforeseeable" but also "beyond the control" and "without the fault or negligence of the contractor." Totally different types of "changed conditions" are envisaged in the two subdivisions of the clause so denominated.¹² In the first subdivision, which refers to "subsurface or latent physical conditions at the site differing materially from those indicated in this contract," the concept of foreseeability plays no part, and it is necessary to show merely that the conditions encountered were incompatible with the terms of the specifications—a condition so seldom encountered that cases falling in this category are rare. In the second subdivision, the provisions of the specifications are still a factor in determining whether a changed condition has been encountered but only in relation to the specific criteria laid down therein. The concept of foreseeability does enter into the problem of determining whether the conditions discovered can be said to be "unknown" or "unusual," and the contractor is not responsible for conditions that could not have reasonably been anticipated but the burden of proof in establishing this is obviously a heavy one, since the contractor must show that the conditions are such that they differ materially "from those ordinarily encountered and generally recognized" as inhering in the work. The burden of proof is heavy because of the presence of the element of general recognition. In other words, the contractor must show not only

¹¹ This proposition is supposed to be established by the high authority of the Supreme Court of the United States in rendering its decision in *United States v. Brooks-Callaway Co.*, 318 U. S. 120 (1943). But the "changed conditions" clause is not discussed or even mentioned in this decision. As for the decisions of the Board cited in footnote 6 of the majority opinion, the concept of foreseeability is discussed only in connection with the definition of the adjective "unknown" in the "changed conditions" clause.

¹² The term "changed conditions" is really a misnomer. The clause is an example of the prerogative exercised by Alice in Wonderland to give words any meaning she chose. As the conditions encountered remain the same from the day of bidding to the day they are discovered, they have not really changed. The term "unanticipated conditions" would be a far happier one.

that he himself would regard the condition as unusual but that they would be generally so regarded in the industry, and this can adequately be established only by expert testimony. Moreover, the criteria for determining whether an event is foreseeable in the future, which is what is contemplated in the "delays-damages" clause, are not necessarily the same as those for determining whether a condition already in existence will be encountered as provided in the "changed conditions" clause. And, even more significantly, the test of reasonability plays no part in the application of the "delays-damages" clause. If an event is in fact foreseeable, it makes no difference that it could not reasonably have been anticipated.¹³

As clauses 4 and 5 of the contract are not identical, and the methods of proving claims under each of the clauses are different, the satisfaction of the procedural and substantive requirements of one of the clauses would in nowise help the other. The Board has held that it will not consider a claim which is made for the first time on appeal.¹⁴ In the present case, however, the majority has considered and decided in favor of the contractor a claim which the contractor itself has not even advanced! It is obvious that the purpose of this maneuver is simply to circumvent and nullify the basic limitation of the "delays-damages" clause, the operation of which is confined to future causes.

What makes the present case even more unique is that the majority has employed the "changed conditions" clause to afford relief to a contractor against the imposition of liquidated damages, although the contractor is not claiming any additional compensation for what must have been six months' extra work if the majority is correct in its decision, and although the contractor has already executed a final payment voucher. I know of no case in which a contractor has ever been so generous towards the Government, or in which a board of appeals has ever been so generous towards a contractor. I doubt, however, that the terms of the contract sanction such generosity.

¹³ This is clearly established by the drafting history of clause 5 of the "General Provisions" for construction contracts (Standard Form 23A, March 1953). It was proposed by some agencies that the concept of foreseeability be ameliorated by substituting for the language in the "delays-damages" clause referring to "unforeseeable causes beyond the control and without the fault or negligence of the Contractor" the phrase "which could not reasonably be anticipated." The minutes of the drafting subcommittee stated: "It was intended by the subcommittee that this would be less strict on the contractor, since he would only be responsible for those things which could reasonably be foreseen, whereas now he is required to be responsible for all things that can be foreseen, whether within reason or not." The proposal was, however, rejected. See minutes of meetings of April 8 and 22, 1949.

¹⁴ *Gila Construction Co.*, 63 I. D. 378 (1956), and *Urban Plumbing & Heating Co.*, 63 I. D. 381 (1956). To the same effect is *Samuel N. Zarpas*, 61 I. D. 386, 388 (1954), decided by the Solicitor of this Department, who also rejected the claim because of the contractor's failure to satisfy the notice requirement of the contract in advancing an excusable cause of delay.

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Clause 4, the "changed conditions" clause of the contract, provides, to be sure, that if the contracting officer finds that changed conditions exist, and these "cause an increase or decrease in the cost of, or the time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly." While this language would seem to permit an adjustment in the time or the cost of performance, I doubt that an increase solely in the time of performance can be granted by the contracting officer unless he also finds that an increase in the costs of performance has occurred. The "changed conditions" clause seems to be based upon a rather perfectionist view of human nature, for it actually seems to contemplate that a contractor will discover and report conditions of performance actually more favorable than those he expected to encounter.¹⁵ In such a case, the Government would obtain a reduction in the contract price and the time of performance would be shortened. In other words, it is contemplated that an increase in the time of performance shall go only with an increase in the cost of performance, and that a decrease in the time of performance shall go only with a decrease in the cost of performance. So far as I am aware there is no case in which a contractor has obtained an extension of the time of performance, without also showing that performance had also been more expensive. Certainly the contractor in this case has offered no such proof, and this fact alone impugns the very foundations of its case. Moreover, while a contractor can always "waive" the payment of money due him, he cannot increase the scope of the power of the contracting officer or the Board by such waiver, and even if he could, there could not be a waiver in the present case, since the contractor has conditioned the waiver upon an extension of time of four additional months, and the majority of the Board has granted only 50 days.

In my view of the requirements of the "changed conditions" clause, there is no room for a subsequent claim by the contractor for additional compensation for the performance of extra work. However,

¹⁵ See John W. Gaskins: "Changed Conditions and Misrepresentation of Subsurface Materials as Related to Government Construction Contracts", in *Fordham Law Review*, Vol. XXIV (Winter, 1955-56), 588, at 588-89: "While the United States Court of Claims has frequently had occasion to discuss the clause as an inducement to bidders to exclude such contingencies from their bids, and while this was certainly the intended purpose of the provision, it would be unwise to overlook the fact that the Government has contended that the language of the clause authorizes either an increase or a decrease in the contract price, and would thus permit the contracting officer to reduce the contract price if the conditions encountered were materially more favorable than those indicated by the plans and specifications. From a practical standpoint, however, it should be observed that it is decidedly the exception rather than the rule for the Government to seek a reduction of the contract price because of a changed condition."

such a claim would be barred not by any waiver of the contractor but by the condition attached to the notice requirement in the "changed conditions" clause, as follows:

Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify consider and adjust any such claim asserted *before the date of final settlement of the contract.* [Italics supplied.]

As the contractor has executed a final payment voucher, the contract has been settled. It is quite immaterial that the final payment voucher contains no language of release, since a claim not supported by proper notice is barred by the terms of the contract itself.¹⁶ And, of course, any claim for an extension of time would be as effectively barred as any claim for additional compensation.

I come now to what is from my point of view the wholly academic question in this case, namely whether there is any satisfactory evidence that the contractor encountered "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract."¹⁷ I pass over lightly the long-standing riddles whether this language refers only to *natural* physical conditions,¹⁸ and to subsurface conditions at the site.¹⁹ Disregarding the doubts occasioned by these questions entirely, I can find no satisfactory evidence in the record that any of the conditions encountered by the contractor in the demolition of the Drexel Building meet the general tests laid down in the "changed conditions" clause.

I know of no other case where the Board has afforded relief under the changed conditions clause upon a record so bare. An informal conference took place in this case but there was no formal hearing, and the case was submitted for decision after an exchange of affidavits.²⁰ At

¹⁶ Although the Armed Services Board of Contract Appeals no longer applies the general doctrine that it will not consider claims made by the contractor after he has executed a final payment voucher, it has declined to consider claims made after the acceptance of final payment in situations in which the contract itself bars such consideration. See appeal of *Dale R. Beauchamp*, ASBCA No. 366 (Febr. 28, 1950), and other cases there cited.

¹⁷ In view of the nature of the specifications in this case, the first subdivision of clause 4 is obviously inapplicable.

¹⁸ See *George W. Condon Company*, 57 I. D. 539, 543 (1942): "Article 4, which provides for changed conditions, relates specifically to *natural*, physical conditions * * *"

¹⁹ See *The Arundel Corporation v. United States*, 103 Ct. Cl. 688, 711, *cert. denied*, 326 U. S. 752 (1945): "The second part of Article 4 contemplated unknown *subsurface* conditions of an unusual nature and differing materially from those ordinarily encountered and generally recognized as inhering in the character of work called for * * *"

²⁰ The statement is made in the majority opinion that "the Board has received and considered affidavits from both parties." Actually the appellant and the contracting officer each submitted only one affidavit.

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the informal conference all the members of the Board attempted to get the contractor to supply detailed evidence in substantiation of its claim,²¹ but the affidavit finally submitted in support of the contractor's case merely repeated the general assertions and requests previously contained in the contractor's letters to the contracting officer. The fact that these were now put in the form of an affidavit can be regarded as adding very little, if anything, to their weight. Indeed, the affidavit was so ambiguous that the contracting officer was led to assert in his counter-affidavit, which was also highly argumentative, that "the Contractor claims to have suffered the loss of seventeen weeks' additional time in performing a project which actually required only a total of nine weeks to complete." Moreover, the attitude of the majority towards the contractor's affidavit is highly eclectic, some assertions being accepted while others are rejected. The majority has ingeniously put together the contractor's case, not so much from the affidavits as from the old plans of the Drexel Building furnished to the contractor and from a group of photographs of the building in the course of its demolition. Unfortunately, however, the conclusions reached in the majority opinion with respect to some of the contractor's difficulties are based simply on the contractor's own assertions, or upon various theories entertained by the majority with respect to the problems of the wrecking business. Indeed, my colleagues have laid claim to a degree of expertness in this field which one would not ordinarily associate with their profession, and this assumed expertness has been employed to establish the elements of general recognition which could not be supplied by the contractor's own assertions. Even more remarkably, my colleagues have chosen to disregard almost entirely whatever testimony there is on the other side that is contained in the uncontradicted statements made by the Government's resident architect and contracting officer at the informal conference before the Board, as hereinafter set forth.

Basically, I have two difficulties in accepting the majority's application of the "changed conditions" clause. The first is that a contract for the demolition of a building has been treated as if it were a contract for the construction of a building. But, although the contract is on the standard form for construction contracts, it is, so to speak, a destruction contract. The construction of a building is a planned and orderly process, every principal phase of which is governed by detailed specifications and drawings. The demolition of a building is, on the other hand, a process which is not ordinarily described in

²¹ See Transcript of conference, pp. 18, 23, 24.

any great detail, since the owner is primarily interested in getting the building down, and cares little how this is done. Indeed, the owner would not ordinarily know all the details of the building's construction, for even if he had the original plans, there may have been many changes in the course of the actual construction, and the structure may have been further affected by deterioration as a result of the operation of the forces of nature, which may cause more difficulties in the process of shoring than any peculiarities of construction. In the demolition of an old building the unexpected must be regarded as normal. Considering everything, the problems encountered by the contractor appear not to have been abnormal.²² What the contractor encountered were not "changed conditions" but the ordinary problems inherent in demolition, and such problems have never been regarded as the basis for either extensions of time or additional compensation.

My second basic difficulty, which is perhaps only another phase of the first, is that I am unable to perceive how in the case of an old building such as the Drexel Building, which dated from an era which was long before methods of skyscraper construction had been standardized, and which, therefore, was known to be atypical, the conditions encountered could be said to be different from those which the contractor could have expected to encounter. Indeed, at the informal conference the author of the majority opinion himself pointedly remarked to Mr. Skyanier, the appellant's president: "Generally speaking, you knew this was an old building, put up about three-fourths of a century ago. You would expect a method of construction that was not modern."²³

If anomalies of construction were to be expected, it seems to me quite immaterial that some were shown on the drawings, while others were not, or that some were ascertainable by visual inspection while others were not, especially since as the majority recognizes the drawings were known to be incomplete, and visual inspection showed that

²² Lest I be thought to have fallen into expertism of my own, let me hasten to add that this theory was actually adumbrated by the resident architect at the informal conference. Thus he said: "The general problem in the demolition of a building is to go in and take it down. You have nothing to caution you * * *. I appreciate the fact that during the demolition there would be certain conditions which would be uncovered which could not be anticipated. I don't think that is unusual at all. I think that is very normal in demolition: * * *." (Transcript of conference, pp. 2-3.) Somewhat the same idea was present also in the mind of the Court of Claims in *Bryne & Forward v. United States*, 85 Ct. Cl. 536 (1937), when it said: "The defendant was not contracting for the construction of a dry-dock and it did not undertake to give complete specifications as to the construction of the dry-dock which was to be removed." In the majority opinion, it is conceded that the factual situation in the present case is similar in many respects to that in the *Bryne & Forward* case, but its force is not acknowledged because of a technical difference in the contractual provisions. This does not in any way detract, however, from the force of the court's dictum.

²³ See Transcript of the conference, p. 25.

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there had been departures from the drawings. The fact that there had been departures from the drawings in some particulars would constitute a general warning against any reliance on the drawings. The contractor, moreover, was not limited to visual inspection, since under the specifications he was afforded an opportunity not only to inspect the building from the outside but to open various parts of the building to reveal structural conditions.²⁴

The Board has only recently emphasized in "changed conditions" cases that a contractor cannot claim a condition to be "unknown" when he has had but has ignored opportunities for obtaining knowledge of its existence.²⁵ Apart from the possibility of physical exploration, the record reveals that there were other sources of information available to the contractor. One of these sources is revealed in the passage from the contractor's affidavit which is quoted in the majority opinion, namely "Roy Ridge, Chief of the Bureau of Building Inspection of the City of Philadelphia, *who is familiar with the construction of the Drexel Building* * * *." Perhaps an even better source was revealed at the informal conference by the resident architect. He identified him as a Mr. Bashore, who was indeed the person from whom the old set of plans turned over to the contractor had been obtained and whose knowledge of the Drexel Building must have been encyclopedic, since he worked for many years for the firm of architects which had designed it.²⁶

Indeed, I believe that the majority opinion compromises in general the standards adopted by the Board in the recent *Shilling* and *Arm-*

²⁴ In this connection, my colleagues assert their expertise to conclude that the contractor could not reasonably have been expected to make a structural exploration of a building of the massive type of the Drexel Building. Unfortunately, I do not know enough about the wrecking business to be able to determine whether they are right or wrong. In the absence of evidence to the contrary, I think, however, that the Board should not assume that a provision of the specifications was wholly impractical. I do know that at the informal conference, both the resident architect and the contracting officer spoke of the possibilities of structural exploration as if it were practical. The resident engineer remarked to Mr. Skyanier: "You were given every opportunity too to dig into the building at any place and make a physical investigation." Mr. Skyanier replied: "That is absolutely correct." (Transcript of conference, pp. 2 and 12.) Compare also *Dunbar & Sullivan Dredging Co. v. United States*, 65 Ct. Cl. 567, 570, 576 (1928), where there was evidence with reference to the practicality of a similar provision of the specifications.

²⁵ See, for instance, *L. D. Shilling Company, Inc.* (Supp.), 63 I. D. 105 (1956), and *J. D. Armstrong Company, Inc.*, 63 I. D. 289 (1956).

²⁶ Thus the resident architect states: "We had a man who worked in the building since 1907. He has been the architect of the Building since 1935. From his knowledge we prepared the specifications and through him we were able to supply these drawings, and because of his detailed knowledge of the building we tried to incorporate in our specifications and to pass on to anyone who was bidding any information we had." And, again, the resident architect stated: "Mr. Bashore was in charge of the Drexel Building from 1935 until the building was torn down. Prior to that time, from 1907, until last year, he was working for the firm of architects who designed the building, and that is how come we have these drawings."

strong cases. In the majority opinion attention is called to the trend of decision which began in the Court of Claims with the *Chernus* case. Certainly the "changed conditions" clause is not to be read out of a construction contract. But the Board, although fully aware of the *Chernus* and subsequent cases, had occasion to say in the *Shilling* case.

* * * While the Court of Claims has emphasized that the limiting provisions of specifications must be read in the light of the "changed conditions" article, so that effect will be given to all the provisions of the contract, the Board does not believe that the Court intends that the article be made the Achilles heel of every construction contract.²⁷

I come finally to what is perhaps the most extraordinary aspect of the majority opinion, namely the manner in which the 50 days' extension of time allowed to the appellant has been calculated. Even the majority's own statement of this problem cannot conceal the wholly arbitrary manner in which the result has been arrived at. Actually the record is almost totally devoid of any real evidence for determining what extension of time should be allowed to the appellant. There are no cost records, or payrolls, or time sheets, or any other relevant data in evidence. The contractor's affidavit apparently assigns two arbitrary periods of seventeen and nine weeks, or a total of 26 weeks to cover its delays from all causes. The majority of the Board concludes on the basis of "the record as a whole," which is one of the traditional euphemisms for the lack of any real evidence, that the appellant is entitled to the additional extension of time of 50 days.

To reach such a conclusion it is necessary first to dispose of the difficulty that the contracting officer has already allowed the appellant an extension of time of 60 days. This the majority accomplishes by assuming that in his affidavit the contracting officer "related" this extension "to the portion of the demolition job which involved the preparations for the removal of the trusses in the northeast and northwest wings * * *." It seems to me, however, that one can "relate" a delay to a particular factor without making it exclusive. I read "the record as a whole," taking into consideration the other and contradictory statements previously made by the contracting officer, to mean that he gave the contractor the 60 days' extension of time to take care of all the structural factors involved in the demolition. If this is so, then any masonry removal delays subsequently encountered would not necessarily be concurrent with "the delays on account of which the 60-day extension was granted."

Moreover, even if it can be assumed from two photographs in evidence that work on the parapet began on or about May 13, 1955, and

²⁷ 63 I. D. 105 at 116.

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demolition of the ninth story was completed on or about October 31, 1955, some of this time was lost, as is indeed recognized in the majority opinion, from other causes for which the appellant is not entitled to any extensions of time. As the appellant has not assigned any particular number of calendar days to each or indeed to any of these causes, it is apparent that nothing even approaching a definite calculation of the net time lost can be made. The majority of the Board has been driven, therefore, to taking a fraction of the time lost—apparently a third—as a basis for relief. But there is no more rational basis for taking a third than a half or a fourth, fifth or sixth. Moreover, even the undoubted fact that much of the delay (if not all of it, as the Government contends) was due to the contractor's own inability to recruit sufficiently experienced crews—a fact acknowledged by its own superintendent—has not given the majority any pause. And, this, too, in a case in which the specifications expressly made time the essence of the contract (a provision the majority has seen fit to relegate to a footnote).

The majority attempts to justify its calculations by asserting that the standards of proof which it has applied have been judicially approved in comparable situations.²⁸ It is true that there is a general doctrine in the law of damages that when the fact of damage has been established, uncertainty as to the amount of the damage will not preclude recovery. But this doctrine does not go so far as to justify mere guesswork. As the Court of Claims said in *Addison-Miller, Inc., et al. v. United States*, 108 Ct. Cl. 513, 557, *cert. denied*, 332 U. S. 836 (1947): "It is undoubtedly the rule, of course, as plaintiffs say, that uncertainty as to the amount of the damage does not preclude recovery where the fact of damage is clearly established. * * * However, it is equally well settled that we cannot indulge in pure speculation."

In fact, the cases cited in the majority opinion do not involve anything like the degree of uncertainty which exists in the present case. This is apparent even though the evidence in these cases is not set forth in precise detail. In the *Shepherd* and *Johnson* cases, the claims involved are for damages in monetary amounts, and not for extensions of time for performance. In the *Shepherd* case, the court described the evidence as "voluminous," and it was possible to base the calculation of the amount of the damages on the cost per cubic yard of excavating, hauling and dumping the wet material encountered by the contractor.

²⁸ The cases alleged to support this proposition which number four altogether—three in the Court of Claims, and one in the Armed Services Board, are cited in footnote 15 of the majority decision.

In the *Johnson* case, one of the claims was actually rejected on the ground that the damages were too uncertain, and in the case of the other claims the items of cost appear generally to have been itemized, and the uncertainty as to the exact amount of each claim arose primarily from the uncertainty concerning the extent to which the plaintiff could have minimized its damages. The *Chalender* case is the only one of the three Court of Claims cases cited in the majority opinion in which an extension of time was involved in addition to monetary damages. So far as delay in performance was involved in this case, the Government was responsible for part of the delay in failing to deliver materials, and the contractor for the other part of the delay, which was concurrent with the delays of the Government. In this case, moreover, *both the amount of the damage, as well as the total extent of the delay was established with mathematical exactness*. As the court pointed out:²⁹ "While no dispute now exists between the parties as to the total number of 71 days of delay or as to the amount of the loss, \$38,390.33, the parties do differ on what portion of the total delay they believe chargeable to each other." The court simply split the difference between them in half, and this appears to have been justified by the fact that the Government was entirely or partly responsible for at least 34 days of the delay.

The *Lincoln Industries* case decided by the Armed Services Board is even more remote from the situation in the present case. While it involved the problem of calculating the duration of a delay due to an error in Government specifications, the record indicated pretty closely how long it took to get the error corrected. An Armed Services case far more in point but not cited in the majority opinion is *E. A. Brunson Construction Company*, BCA No. 61, July 22, 1943 (1 CCF 251), in which there was a series of overlapping causes of delay, some of which may have been excusable, but others were not excusable—exactly the situation in the present case. The Board in declining to allow any extension of time said:

The burden is upon appellant to establish its right to an extension of time. The evidence submitted is uncertain in failing to connect the number of days lost with each particular cause alleged. Appellant estimates its days lost, but such estimate does not indicate whether or not there is an overlapping of causes or of times of delay * * *.

The evidence in this case leaves the matter uncertain as to whether or not those causes resulting in overlapping periods of alleged delay inure to the benefit of appellant.

Although I have assumed for the sake of argument that the doctrine of uncertainty in the law of damages is applicable to cases before the

²⁹ At page 564 of its opinion. [127 Ct. Cl.]

May 1, 1957

Board, I should point out, however, that the doctrine can be applicable only, if at all, by way of analogy. Damages are awarded for breach of contract, which necessarily involves culpability, and it seems just that a party who has breached a contract should not be allowed to avoid the obligation of indemnity merely because the extent of the damages are somewhat uncertain. The Board ordinarily has no jurisdiction, however, to adjudicate breaches of contract, and award damages for such breach. It can award only additional compensation pursuant to the express provisions of the standard forms of Government construction contracts, and no element of culpability is involved in such determinations. It would seem proper, therefore, that an administrative board should be more cautious than a judicial body in estimating additional compensation.

It is true, of course, that in extending the time of performance both an administrative board and a court are not engaged in awarding damages, but in applying contractual provisions. Both agencies should recognize, however, that in extending the time of performance they are acting in derogation of the common law, which recognizes very few excuses indeed for failing to perform on time. Where it is not possible to determine with even an approximate degree of certainty whether or how much of an extension of time should be allowed to a contractor, he should be held to the contractual period of performance. Such an approach is particularly justified in a case in which no part of the delay can be attributed to any fault of the Government, as is true in the present case. Otherwise, the function of the provisions for liquidated damages in Government contracts will be seriously undermined.

I would deny the appellant any additional extension of time. Indeed, if I am correct in my contentions, the Board would be justified in canceling the 60 days' extension of time allowed by the contracting officer.

WILLIAM SEAGLE, *Member.*

PER DIEM ENTITLEMENT OF MEMBERS OF THE VIRGIN ISLANDS LEGISLATURE

Virgin Islands: Legislature

Members of the Legislature of the Virgin Islands who are entitled to per diem under section 6 (e) of the Revised Virgin Islands Organic Act may receive per diem only for such days as they are physically present in actual sessions of the Legislature.

Virgin Islands: Legislature

The Virgin Islands Legislature is in "actual session" when the roll is called and a quorum is present.

M-36438

May 1, 1957*

TO THE DIRECTOR, OFFICE OF TERRITORIES.

This will reply to your request for my views as to whether members of the Legislature of the Virgin Islands who are entitled to per diem under section 6 (e) of the Revised Organic Act may receive such per diem only for such days as they actually attended sessions of the legislature. I am of the opinion that, under such section, the United States would be without authority to pay per diem to a legislator for any day during which he was not physically present at an actual session of the legislature. That being so, I am further of the opinion that, absent such "actual session," which I define to mean a call of the roll and the presence of a quorum, per diem cannot be paid for any other legislative activity, such as committee meetings or a legislative session at which a quorum is not present.

I regret the necessity for reaching this conclusion, because I am aware that legislators in other jurisdictions frequently receive per diem for legislative activity carried on during days when the legislature does not in fact meet. For the reasons set forth below, however, and particularly in the light of the peculiar language of the Revised Virgin Islands Organic Act pertaining to your question, I am compelled to conclude that per diem may not be paid with respect to any day during which the legislature does not in fact meet.

Section 7 (a) of the Revised Organic Act of the Virgin Islands (68 Stat. 497, 500; 48 U. S. C., 1952 ed., Supp. III, sec. 1573 (a)), provides for annual regular sessions of the Virgin Islands Legislature of "not more than sixty consecutive calendar days" and for special sessions under specified circumstances. Section 6 (e) (68 Stat. 497, 499; 48 U. S. C., 1952 ed., Supp. III, sec. 1572 (e)), provides in pertinent part:

* * * Each member of the legislature who is away from the island of his residence shall also receive the sum of \$10 per day for each day's attendance *while the legislature is actually in session*, in lieu of his expenses for subsistence, and shall be reimbursed for his actual travel expenses in going to and returning from each session, *or period thereof*, for not to exceed a total of eight round trips during any calendar year. The salaries, per diem, and travel allowances of the members of the legislature shall be paid by the Government of the United States. [Italics supplied.]

*Out of chronological order.

May 1, 1957

I have been unable to discover any court decisions construing the phrase "actually in session." This is not surprising, for I am not aware that the phrase has appeared in the past in any statute. There are decisions, however, which elaborate upon the meaning of the term "session," and these decisions support the position I have taken.

In *Shaw v. Carter*, 297 Pac. 273 (1931), the Supreme Court of Oklahoma held at page 279 that the phrase "after sixty days of such session [of the legislature] have elapsed" meant "sixty legislative working days, wherein there was an actual assemblage of the Legislature for business, and wherein there was an actual sitting of the members of such body for the transaction of business * * *." To the same effect is *Farwell Co. v. Matheis*, 48 Fed. 363 (1891), where the court at page 364, in defining the phrase "last three days of the session," held that:

The correct construction of this clause depends upon the definition of the word "session" as therein used. The prime definition of this word, when applied to a legislative body, is the actual sitting of the members of such body for the transaction of business * * *. The "last three days of the session," * * * means working days, when the legislature is in actual session for the transaction of business. * * *

Thus, if the term "session" alone were used in section 6 (e), unqualified and unmodified, the section might be required to be construed to preclude the payment of per diem for other legislative activity. But when the word "actual" is used to modify "session," as it is in section 6 (e), it seems to me inescapable that per diem may be paid solely for days "when the legislature is in actual session for the transaction of business"; i. e., when the legislature meets, the roll is taken, and a quorum is found to be present. Any other conclusion would ignore the plain meaning of the term "actually."

I believe further that my view, that per diem may be paid only as a consequence of attendance at a session held for the transaction of business, is supported by the words of section 6 (e) stating "each session, or period thereof." This language indicates that the Congress understood that, during the total period in which the legislature is authorized to meet, there may be adjournments during which the legislators may not be entitled to per diem.

I believe the statute is sufficiently clear on its face so that resort to the legislative history is unnecessary. I should like to point out, however, that the legislative history of the Revised Organic Act supports my view. Although it contains nothing explicit on the question of the precise days during which per diem is intended to be paid, it is abundantly clear that one of the principal purposes of the statute

was to limit legislative expenses in the Virgin Islands. It is obvious that the Congress, aware of the extremely high legislative costs in the territory, was anxious to limit all such costs, whether represented by travel, per diem, or salaries. In his "Virgin Islands Report" to the Senate Committee on Interior and Insular Affairs, published as a committee print in the 83rd Congress, 2d session, the late Senator Butler, after pointing out that legislative costs in the Virgin Islands had risen from \$16,027.20 in 1929-1930 to \$99,010.07 in 1952-1953, stated at page 21:

In the majority of the States, the sessions of the State legislature are limited, by law or by the State constitution, and in a number the legislators are paid \$10 a day or less. In the case of Guam, under the most recent organic act the Congress has enacted, the system of 60-day regular sessions, with per diem compensation, which seems to have worked very well.

Therefore, I am recommending that the new Virgin Islands Organic Act follow the precedent which has worked so well in Guam, with an even larger population, and thus limit the length of session and the compensation of the members of the Virgin Islands Legislature.

The Senate Report on the bill which became the Organic Act (Senate Rept. 1271, 83d Cong., 2d Sess.) stated at page 3:

The Organic Act is silent on the length of the session of the municipal council and the compensation of their members. As a result, the councils have voted themselves annual salaries of up to \$2300 a year, plus expenses, and are more or less continuous session de facto.

In the circumstances, in the light of the clear language of the statute and the apparent intent of the Congress, I believe the word "actually" must be given its usual, literal meaning. I am therefore compelled to conclude that members of the legislature, entitled to per diem under section 6 (e), may receive such per diem only for such days as they are physically present in sessions of the legislature called for the transaction of business.

I am aware that members of the Virgin Islands Legislature have, during some of the days in which the legislature is authorized to meet, engaged in various official legislative activities without first meeting in a legislative session. I understand that they have held committee meetings, sometimes meetings of the committee of the whole, with respect to which they are unable to receive per diem under this opinion. Additionally, I am advised that at least on some occasions, members from St. John and St. Croix have traveled to St. Thomas for actual sessions, only to find upon arrival that a quorum is not present. I regret that I am unable to hold that they may receive per diem for such days and for such activities, but I cannot so hold

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in the light of the language of the statute. An "actual session" during the day in question is a prerequisite to the payment of per diem.

A. M. EDWARDS,
Associate Solicitor.

Approved:

EDMUND T. FRITZ,
Deputy Solicitor.

APPEALS OF MORRISON-KNUDSEN COMPANY, INC.

IBCA-36 and IBCA-50 *Decided May 27, 1957*

Contracts: Additional Compensation—Contracts: Changes and Extras—
Contracts: Changed Conditions—Contracts: Specifications

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation.

Contracts: Additional Compensation—Contracts: Changes and Extras—
Contracts: Performance—Contracts: Damages: Unliquidated Damages

The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficulties encountered in finishing

the subgrade when such difficulties were due to its own haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause, and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not maintain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.

BOARD OF CONTRACT APPEALS

This decision disposes of two appeals of the contractor from the findings of fact and decisions of the contracting officer, dated May 3 and May 16, 1955, and July 7, 1955, under Contract No. 14-04-002-50, Specifications No. FP-41, as revised July 15, 1941, with the Alaska Road Commission, hereinafter referred to as the Commission (IBCA-36 and IBCA-50, respectively).¹

The contract, which was on U. S. Standard Form No. 23 (revised April 3, 1942), and which was entered into on April 6, 1953, provided for grading and drainage of Section G, Richardson Highway, located between Mile Posts 36 and 82, north of Valdez, in the vicinity of Tonsina, Alaska. The center point of the 45.37-mile job was approximately 250 miles from Anchorage (Tr., p. 50). The contract was at unit prices, which, in accordance with the original estimates, would have made the total contract price \$2,083,853. The work was to be performed in accordance with "Specifications for Construction of Roads and Bridges in National Forests and National Parks, 1941, of the Public Roads Administration,"² as modified by the terms of part III of the Special Provisions of the contract.

Notice to proceed under the contract was sent to the contractor on April 9, 1953. The completion dates were stipulated to be October

¹ The Federal-Aid Highway Act of 1956 (70 Stat. 374, 377; 23 U. S. C., 1952 ed., Supp. IV, sec. 156 (b)) provided for the transfer of the functions, duties, and authority pertaining to the construction, repair, and maintenance of roads, etc., in the Territory of Alaska, from the Department of the Interior to the Department of Commerce. Pursuant to the act, the functions of the Alaska Road Commission were transferred to the Department of Commerce, but the Commerce Department agreed that the appeals should be determined by the Interior Board of Contract Appeals, which had conducted a hearing thereon prior to the approval of said act.

² These specifications, which are sometimes referred to as FP-41, will be denominated herein as the standard specifications. They form a printed book of 512 pages, consisting principally of a series of general articles, descriptions of work items, and a standard bid schedule.

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15, 1953, for specified portions of the project, and November 14, 1954, for the whole project. The contract was completed in the spring of 1955, within the time limit of the contract, as extended by the contracting officer, who was the Chief Engineer of the Commission, because severe winter weather had forced an early shutdown on October 26, 1954.³

The present decision will consider the two appeals. In IBCA-36, the contractor seeks additional compensation in the total amount of \$167,970.44 because of the total deletion of item 100(1) of the contract, which provided for a "Select Borrow Surface Course," and was designated as a "major item" in the bid schedule. This claim consists of four separate items, as hereinafter described.

In IBCA-50, the contractor seeks additional compensation in the amount of \$126,525.30 by reason of "changes" and "changed conditions" relative to sources of borrow. This claim is closely related to that based on the deletion of item 100(1), and has influenced, indeed, the magnitude of the amounts of some of the items involved therein.

At the request of the contractor, therefore, the two appeals were consolidated and a hearing was held on both at the same time. On September 24, 1955, also, at the contractor's request, the hearing officer, Theodore H. Haas, Chairman of the Board, visited the site of the work. He was driven over the road by the contractor's representatives and in the presence of representatives of the Government and of the contractor, borrow pits and other features of the road and the adjoining land were pointed out to him. Subsequently, on September 26, 27, and 28, 1955, he held hearings in the grand jury room, United States Post Office Building, Anchorage, Alaska.

In view of the close relationship between the items involved in the two appeals, the consideration of the separate items will be prefixed by a general chronological account of the events which led up to the taking of the appeals.

1. *The Genesis of the Claims*

In a letter dated August 6, 1953, A. L. Brown, then the contractor's superintendent of the project involved in these appeals, wrote to the Commission stating that "Our borrow production has been seriously curtailed by the recent pit changes which have resulted in much longer hauls than shown on the plans." The Commission was also notified in this letter that the new conditions necessitated a revision of schedule

³ This action was taken pursuant to article 8.7 of the standard specifications, as modified by part III of the Special Provisions.

operations and that after August 15, 1953, the contractor would operate on one shift only on all operations other than unclassified excavation for borrow (Appellant's Exhibit No. 41).

In a letter dated August 22, 1953, to H. A. Stephan, Resident Engineer of the Commission, Superintendent Brown set forth details of the changes in borrow pit locations. He asserted that abandonment of many borrow pits at the instance of the Government had increased substantially the burden on the usable pits and resulted in the unbalancing of equipment spreads placed on the site for performing work covered in the original plans and specifications (Appellant's Exhibit No. 42). He also asked for a negotiated change order or supplemental agreement at that time or upon completion of the work. The resident engineer of the Commission replied in a letter dated August 28, 1953, that he was not in a position "at this time to give an even near accurate account as to whether or not we will exceed the 25% allowable overrun on overhaul" (Appellant's Exhibit No. 43).

The reference to 25 percent overrun was to the provisions of article 4.3 of the standard specifications which had been cited by the contractor in its letter. This article recited that changes in plans were to be expected and provided for equitable adjustments when the overrun or underrun in the quantities of the bid schedule exceeded 25 percent of the total cost of the contract calculated from the original bid quantities and the original contract unit prices. Subdivision (c) 2 of article 4.3 of the standard specifications provided that upon demand, a negotiated settlement order or supplemental order would be negotiated by both parties for overruns or underruns of more than 25 percent of one or more major items. The equitable adjustment provided for could not be greater than 15 percent in excess of estimated costs.

In a letter to the Commission dated September 16, 1953, the contractor's project superintendent stated that the "various relocations of borrow pits has increased costs considerable and added payments will be requested by the Contractor" (Appellant's Exhibit No. 44). The Resident Engineer replied by letter dated September 25, 1953, stating that under article 6.1 (a) of the specifications, no allowance for payment of increased costs as mentioned in the contractor's letter was permissible (Appellant's Exhibit No. 45). This article provided that the Government "does not assume responsibility as to the quantity of acceptable material available at the sources designated in the special provisions or otherwise designated."

About a year later the Assistant District Manager of the contractor wrote a letter dated October 1, 1954, to the Resident Engineer, in which was included a provisional table of variances of borrow sources

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and a change in the contract unit price, item 28 (2), Special Overhaul of Borrow (Appellant's Exhibit No. 46), was requested. Subsequent letters were exchanged, including a letter dated May 4, 1955, from the District Engineer to the contractor in which the claim was said to lack merit because there had been no changes (Appellant's Exhibit No. 55).

In the meantime, while the controversy over the variances in borrow sources was still continuing, the contractor was suddenly notified by the contracting officer on April 23, 1954, by telephone and confirming telegram, of the deletion of item 100 (1). (Tr., pp. 53, 72-73.) The telegram read as follows:

CONFIRMING TELECOM THIS DATE SERIOUS OVERRUNS IN PROBABLE COSTS MAKE IT NECESSARY TO ELIMINATE ITEM NUMBER ONE HUNDRED PAREN ONE PAREN SELECT BORROW SURFACE COURSE pd THEREFORE DISCONTINUE ANY PREPARATORY WORK THIS ITEM OF YOUR RICHARDSON G CONTRACT.

The deleted item read as follows:

Item	Estimated Quantity	Pay names, with unit bid price written in words	Unit Bid Price	Amount Bid
100 (1)-----	175,000	Cu. Yds. Selected Borrow Surface Course, at One and 20/100 Dollars per cu. yd.	1.20	210,000.00

By Change Order No. 4, dated April 28, 1954, the contractor was notified of the same deletion in the drawings and specifications. The order also provided in pertinent part:

It is estimated that this change will decrease the contract price by \$210,000.

No change in the time for performance will be made as a result of this change other than as provided by Article 8.6 of the FP-41 Specifications.

This article stated that the contractual provision regarding time in article 1 should govern (that is completion by November 14, 1954) unless extended by the contracting officer.

The contractor acknowledged receipt of this change order, but refused to accept it, striking out the words "and accepted," which appeared at the bottom of the change order. (Tr., p. 75.) By letter dated May 17, 1954, and subsequently, the contractor informed the Commission that a claim would be made on account of the deletion. (Tr., pp. 78-83.)⁴

⁴ Whatever question might have arisen because of the possible failure of the contractor to comply with the 10-day requirement of the contract for giving written notice of a claim (article 15) must be considered to have been waived by the contracting officer, since admittedly he considered the claim on its merits. (Tr., p. 83.)

By letters dated May 17, June 18, June 24, 1954, the contractor apprised the Commission in more detail of its position on the seriousness of the deletion (Appellant's Exhibits 8, 10, and 12, respectively).⁵ In the June 18 letter, it maintained, among other things, that since receipt of the notice of "proposed elimination" of item 100 (1), it had been subjected to performance requirements which were apparently directed "toward requiring us to make a finish road surface out of what was originally designed and constructed to be a subgrade"; that the requirements laid down for acceptable completion of the subgrade were more onerous and expensive than the contract required, and that consequently it would "claim such additional costs as a part of an equitable adjustment or a negotiated change order or supplemental agreement." In the last letter a "jobsite" conference was requested in order to modify the contract upon a mutually agreeable basis. This letter stated also that additional time would be required to compile the exact amount of the claim for the elimination of the bid item, but estimated that the claim would be \$100,000 and upwards.

In replying to the two June letters by letter of June 30, 1954 (Appellant's Exhibit No. 13), the contracting officer stated in part:

As stated in our wire of April 23, it was necessary to eliminate some work under this contract in order to compensate for serious overruns already encountered. It is anticipated that total earnings will still equal or exceed the lump sum bid of the contract. As you know, our funds are appropriated by the Congress and are subject to definite limitations. Your contract is only a part of a larger program on which a total estimated cost has already been established. Therefore, a Government contract necessarily gives the Contracting Officer considerable latitude in the matter of increasing, decreasing or deleting items or work to meet conditions encountered during construction and to stay within the limits of the appropriations.

The contracting officer also stated in this letter that a conference would be held, if desired, after the extent of the claims had been determined and they had been presented formally with complete supporting data. The contractor was informed also that to save time, a formal claim should be submitted to the contracting officer through the Resident and District Engineers.⁶

The suggested conference was held in Juneau, Alaska, on July 15, 1954. Among other things, the subject of tolerances in the construc-

⁵ The May 17 letter was written to the District Engineer at Valdez with a copy to the Chief of the Operations Division of the Commission. The June 18 letter was also written to the District Engineer but a copy was sent to the Contracting Officer who was the Chief Engineer of the Commission with headquarters at Juneau.

⁶ It should be noted that the District Engineer was an authorized representative of the contracting officer, except for the execution of supplemental agreements, change orders, extra work orders and the approval of subcontracts. See article 1.16 of the standard specifications, as modified by the Special Provisions.

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tion of the subgrade was discussed at the meeting, but, according to the testimony of the General Manager of the contractor, a clear definition of tolerances was not obtained by him. (Tr., pp. 114-123, 128-131.) The contractor also tried to obtain from the Commission a substitute item in the contract—Item 42, "Finishing Earth Graded Roads"—in lieu of the deleted item, but the Commission did not offer any such substitution. (Tr., p. 115.) The contractor was informed, however, that W. H. Johansen, then the District Engineer, was authorized to allow payments for hauls to borrow pits where finer material was obtainable. (Tr., p. 120.)

After the meeting, William J. Niemi, Chief Engineer of the Commission and the contracting officer, wrote the contractor a confirmatory letter dated July 21, 1954. He stated that the Government would require no greater refinements on subgrade finishing than would have been required had the select borrow surface course, item 100 (1), not been eliminated. He also authorized the contractor "to obtain and place finer borrow material to cover several short sections where cobblestones will not permit finishing work without considerable extra effort. This latter course is to be optional with the contractor to fit his program and equipment. Payment, of course, would be at bid prices." (Appellant's Exhibit No. 24.) Finally, he stated that he was empowered to reimburse the contractor for costs incurred as a direct result of the elimination of item 100 (1) and that he was prepared to do so upon presentation of supporting information and cost data.

By letter dated February 27, 1955 (Appellant's Exhibit No. 14), the contractor formally presented to the district engineer the items of its claim arising from the deletion of item 100 (1). The four items included in the claim at that time totaled \$185,447.42, notwithstanding the fact that by letter dated April 13, 1955 (Appellant's Exhibit No. 9), a downward revision had been made in Item No. 1. On May 4, 1955, the contracting officer denied items 2, 3, and 4 of the claim, but by letter dated May 12 and mailed on May 16, 1955, which apparently was mailed with his findings of fact and decision of the latter date,⁷ he conceded the obligation of the Government to make an equitable adjustment to repay the contractor for expenditures incurred in connection with preparatory work devoted exclusively to the deleted item. The contracting officer stated further that since the information available was insufficient for him to determine the measure of damages, if any, suffered by the contractor, he had "no option but to deny the

⁷The date of the mailing of the letter of May 12, 1955, is given in paragraph 12 of the contracting officer's findings of fact and decision of May 16, 1955. It constitutes Exhibit "B" attached to the findings.

claim as presented." By a finding of fact and decision dated May 16, 1955, the contracting officer formally denied Item No. 1 of the deletion claim for similar reasons. Subsequently, an appeal was taken from both findings of fact.

2. *The Borrow Claim*

In advancing the borrow claim, the contractor maintains that it prepared its bid in reliance on Sheet 3 of the contract drawings which gave borrow pit locations, including the pits suitable for sources of item 100 (1), the Select Borrow Surface Course (Tr., pp. 53, 173, Exhibit 1), quantities of borrow obtainable from each pit, quantities of excavation, embankment, borrow and overhaul as to each section of the roadway; that each of these elements were materially changed during actual performance; that many of the pits were not opened; that there were large variations in the designated borrow pits and those that were later opened, amounting, in some instances, to pit failures of over 60 percent; and that excavation marked suitable for borrow or subgrade embankment had to be wasted (Tr., pp. 7-11, 163-7, 173-186); that there were abundant pits within the limits of the job sites, including material on the most southerly 15 miles of the road that contained the specifications topping material (Tr., pp. 134-6, 253); that, despite protests that the pit deficiencies and changes were resulting in longer and more expensive hauls than shown on the plan (Tr., pp. 30-31, 186-188), the contractor was not permitted to take material from a borrow pit required by the specifications and use it for the topping material, except in two cases, because no overhaul was allowed for such, and, hence, it had to use the oversized and unsuitable material in the designated borrow pits (Tr., pp. 102-111, 144, 250-253, 268-274; Exhibits 20-21).⁸

The record discloses that the contractor removed 607,754 cubic yards of borrow, comprising 336,682 yards within haul distances shown on the plans, and 271,072 yards beyond haul distances shown on the plans (Appellant's Exhibit 53). In addition, the subcontractor removed 175,883 cubic yards, of which only 43,956 cubic yards were hauled according to the plans (Appellant's Exhibit 53, p. 6). The total yards removed by the appellant and its subcontractor were thus 783,637 yards. As the estimated quantity of borrow was 742,000 cubic yards, the overrun was less than 6 percent.

⁸ When the contractor objected to the quality of the borrow the Commission replied by letter that the decision as to the material was up to the Government's Resident Engineer (Tr., pp. 107-110). Oversized rock was defined by the project superintendent of the contractor as rock over 6 inches in diameter (Tr., pp. 251-252).

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However, there were wide variations of borrow sources. Of the 29 borrow pits, including all those north of the pit at mile 51.6, 12 pits failed to yield any material at all, 3 failed to yield 30 percent of the required amounts, and 4 failed substantially to yield plan quantities. As a result, 13 pits not designated on the plans were developed and the pits capable of yielding above-plan quantity were expanded. These figures were compiled as of September 24, 1954 (Appellant's Exhibits Nos. 1 and 36).

With respect to overhaul, item 28, the bid quantity was 345,000 cubic-yard miles. The Government concedes that there was a substantial overrun in this item (Appellant's Exhibit 46), and the contractor concedes that such overrun has been paid for (Tr., p. 31). The Government points out, however, that the record does not show the exact amount of the overrun expressed in terms of cubic-yard miles.

The contractor maintains that the payments for overhaul constitute only a small part of the additional cost which resulted from the alleged changes or changed conditions. Because of the change in the estimated quantities of borrow in certain borrow pits and the designations by the Government of other borrow pits, it is contended that the contractor was forced to use unintended and more costly equipment spreads.

Although the contractor contends on appeal that excavation indicated on the plans to be suitable for embankment had to be wasted, no such contention appears to have been advanced in the correspondence between the contractor and the contracting officer or his representatives prior to the findings of fact and decision of the contracting officer of July 7, 1955, or in the notice of appeal filed by the contractor under date of May 31, 1955, and the contracting officer made no findings with respect thereto. The Board cannot, therefore, properly consider this aspect of the claim.⁹ Moreover, the record does not show the precise amount of such unusable excavation,¹⁰ or the extent to which it affected the contractor's costs. In any event, the failure of the excavation would be reflected in an increase in borrow, and overhaul costs, which are part of the claim which the Board can consider.

So far as the borrow claim is concerned, the Government admits that the locations and yields of the borrow pits designated on sheet

⁹ See *Gila Construction Company, Inc.*, 63 I. D. 378 (1956); *Urban Plumbing and Heating Company*, 63 I. D. 381 (1956); *Economy Pumps, Inc.*, IBCA-94 (Feb. 13, 1957).

¹⁰ Some rough idea of the extent of this excavation can be gathered from the gaps in the green lines on the Borrow Location Sketch in evidence as appellant's Exhibit No. 39, but even these gaps are not considerable except between the pits at mile posts 51.6 and 57.9.

3 of the plans (Appellant's Exhibit 1) did not reflect the locations and yields of the borrow pits used in construction. It maintains, however, that the shifts were made because of necessity and in absolute good faith, and that it is not responsible for the quality or quantity of borrow material, and that under the terms of the specifications the contracting officer had discretion to establish new borrow pits not shown on the plans. In view thereof, the Government argues further that articles 3 and 4 of the contract, the "changes" and "changed conditions" articles of the contract are applicable, if at all, only to the extent defined by articles 4 and 9 of the standard specifications, which limit the application of the contract provisions.

It would seem to be clear that, notwithstanding the location of the borrow pits on the drawings, and the other data indicated on the drawings, the Government did not guarantee any of this data, and reserved the right to establish substitute borrow pits when pits indicated on the drawings failed, certainly at least to the extent that such measures were reasonable. These conclusions follow from the provisions of article 2 of the contract, and article 6.1 (a) and item 26-1.3 of the standard specifications. Article 2 of the contract expressly provided that: "In case of difference between drawings and specifications, the specifications shall govern." Article 6.1 (a), to which reference has already been made, provides in full:

The Government does not assume any responsibility as to the quantity of acceptable material available at sources designated in the special provisions or otherwise designated. The contractor shall satisfy himself as to the quantity of acceptable material available at designated sources and as to the amount and nature of work required in producing material, complying with specifications for the individual contract item, from the natural material available at such sources. It is to be understood that the engineer may order procurement of material from any portion of any area designated as a pit or quarry site, and may reject portions of the deposit as unacceptable.

Under item 26-1.3 of the standard specifications, it is provided with reference to the case here involved that "the sources of borrow materials shall be indicated on the plans and/or designated by the engineer * * *." In the light of these provisions, the contractor was not justified in regarding the borrow pit locations and other data on the drawings as positive representations made by the Government. To be sure, the contractor could hardly be charged with knowledge of the probable quantity or quality of material available at sources not designated until after the contract had been let, except, perhaps, in so far as general conditions in the neighborhood of the site could form a basis for such knowledge. But, since the Govern-

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ment was also privileged to open entirely new borrow pits, the lesser risk was, so to speak, submerged in the greater. Article 2.3 of the standard specifications expressly provided that the submission of a bid should be considered *prima facie* evidence that the bidder had examined the site, and the contract documents and was "satisfied as to the conditions to be encountered in performing the work as scheduled, or as at any time altered without resulting in increases or decreases of more than the percentage limits hereinafter stipulated. * * *"

The crux of the present case is, however, whether relief can be afforded to the contractor under the "changes" and "changed conditions" articles of the contract, notwithstanding the special provisions of the standard specifications, which modify the contract articles, and limit the extent to which they may be applied. In exceptional circumstances, the contract provisions on changes and changed conditions may afford a basis for additional compensation, notwithstanding specification provisions relating to visits to the site, and other exculpatory provisions by which the Government reserves freedom of action, and seeks to limit its liability. In special circumstances, too, when overruns or underruns occur in estimated bid quantities, the Government may not always escape liability even though an approximate quantities provision has been included in the specifications. The making of changes in the requirements of the contract has, for example, been recognized as such a special circumstance. In the present case, however, the Board must conclude that the Government is correct in maintaining that the purpose of the provisions of articles 4 and 9 of the standard specifications was to rule out additional compensation to a greater extent than defined therein, even in the exceptional and special circumstances suggested.

Reference has already been made, in connection with the letter of August 28, 1953, to the contractor, to the fact that under article 4 of the standard specifications provision was made for equitable adjustments only when overruns or underruns exceeded 25 percent of estimated quantities. The provisions of articles 4 and 9 of the standard specifications are too long and involved to quote all of them verbatim, especially since they also relate to situations not directly bearing on the present appeal. But it is necessary to point out that they contained a number of unique provisions:

In the first place, they modified article 4 of the contract, the "changed conditions" article, in a very important respect. Two types of "changed conditions" are envisaged by this article. The first clause

of the article refers to "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications." In this type of case, it is necessary to show merely that the conditions encountered were incompatible with the requirements of the specifications—a type of situation so seldom encountered that cases falling in this category are rare. The second type of "changed condition" refers to "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications." The purpose of this clause of the "changed conditions" article is to protect a contractor against conditions which could not reasonably have been anticipated, but the burden of proof on the contractor is heavy by reason of the presence therein of the element of general recognition. In the present case, article 4.2 (a) of the standard specifications eliminated the first clause of the "changed conditions" article entirely. In addition, articles 4.3 (a) and 9.3 (a) expressly modified article 3 of the contract by declaring changes in plans to be "normal" and "expected," and not permitting modifications of contract prices, so long as overruns or underruns did not exceed the 25 percent limit. Finally, it was expressly provided in article 4.2 (b) of the standard specifications that "any modifications of the contract under articles 3 or 4 shall be made only as herein provided * * *."

The key provision among those relating to changes, which is article 4.3 (a) of the standard specifications, provided as follows:

It is mutually agreed that due to latent and/or unforeseen conditions, adjustments of plans to field conditions which cannot be foreseen at the time of advertising, will be necessary during construction, and it is therefore of the essence of the contract, to recognize such changes in plans as constituting a normal and expected margin of adjustment, not unusual and not differing materially in the meaning of article 4.2 (a) and not involving nor permitting change or modification of contract prices, providing only that resulting overruns or underruns from the quantities in the bid schedule do not exceed reasonable percentages.

It is clear that the contractor cannot establish a basis for additional compensation under the "changed conditions" article of the contract. Even if the discovery of latent conditions materially differing from those shown on the drawings or indicated in the specifications could be shown, it would be immaterial since the clause referring to them has been eliminated from the contract. As for the other clause of the article, the contracting officer has found that any contractor experienced in Alaska highway construction, should have known that borrow pit variations were to be expected,¹¹ and the contractor in

¹¹ See paragraph 8 of the findings of fact and decision dated July 7, 1955.

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the present case, who falls in the mentioned category, has not offered any proof that would lead the Board to conclude that it had encountered "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications. * * *" Indeed, it is questionable whether under the language of article 4.3 (a) of the standard specifications the second clause of article 4 of the contract has also not been read out of the contract documents!

The effect of articles 4 and 9 of the standard specifications is not, to be sure, to eliminate entirely the "changes" article of the contract. The total deletion from the contract of a major item because of inadequacy of funds, for example, could hardly be said to be the type of adjustment due to unforeseen field conditions, nor can a total deletion fairly be said to be an overrun or underrun in the estimated quantity, and an equitable adjustment in accordance with the "changes" article of the contract rather than the articles of the standard specifications would be permissible. So, too, payment for extra work for which there would be no applicable basis of payment provided in the bid schedule would not be ruled out by the provisions of the standard specifications, which, indeed, make express provision for such work.¹² What certainly is ruled out, however, is any equitable adjustment except for overruns or underruns by reason of changes which can fairly be said to result from unforeseen field conditions. The fact that such changes may also involve alterations or adjustments in the contractor's planned modes of operation, which turn out to be more expensive, is no doubt unfortunate but legally immaterial under the terms of the specifications in the present case.

The contractor seems to contend that even if the contracting officer could vary pit location to some extent, this privilege could be exercised only in a reasonable manner, and that if unreasonable variations resulted, a change in the requirements of the contract should be held to have been effected. Actually, since the Government reserved under the terms of the contract the right to make changes which were necessary because of unanticipated field conditions, it is unnecessary to determine the issue of reasonability. For the purposes of the consideration of the claim, it may even be assumed that a change was made to meet the unanticipated conditions. That there was such a change would not in itself entitle the contractor to additional compensation.

¹² See articles 1.18 and 9.4 (b). These provisions are consistent with article 5 of the contract, which makes provision for extras.

The contractor relies upon such cases as *Loftis v. United States*,¹³ and *Peter Kiewit Sons' Co. v. United States*,¹⁴ as justifying the application of the "changes" and "changed conditions" article to the circumstances of the present case. This contention does not take into account the unique features of the specifications in the present case. It is also responsible for the contention of the contractor that it should be afforded relief because its additional costs "were not occasioned by or did not result from any overrun or underrun of a contract quantity or pay item," but on the contrary, "were occasioned by the disruption of equipment spreads, hauling distances and related items having to do purely with operational problems, and without reference to whether such operations related to planned or contract quantities or overruns" (Appellant's Reply Brief, p. 31). Under the applicable specifications in the present case, however, any additional compensation was allowable only when overruns or underruns proved excessive, provided only that the changes responsible for producing them arose from unanticipated field conditions. The contractor asks, for example, whether the contracting officer would be privileged under a contract providing for placing of cement to change the location where the cement was to be placed by a mile, or to alter the supply point by the same distance; or whether under a contract providing for the construction of a road the contracting officer would be privileged to change the elevation of the road. Assuming that such contracts contained provisions similar to those in the present case, the answers would depend, obviously, on the motive of the contracting officer in making the change, and on whether the work ordered was extra, or fell under the pay items of the contract. In the illustrations chosen by the contractor, the result of the changes would not have quantitative effects on the pay items, whereas such effects were the principal results of the changes in the present case. The Board finds that the changes in the present case were due to unanticipated field conditions, and that the contractor is, therefore, entitled to additional compensation only by reason of overruns or underruns in excess of 25 percent of the estimated bid quantities. It is interesting to note that the contractor itself presented its claim on this basis in its letter of October 1, 1954, to which reference has already been made. In addition, article 4.3 of the standard specifications was invoked as a basis for adjustment of borrow and overhaul in a letter dated August 22, 1953, from the contractor to H. A. Stephan, the Government's Resident Engineer (Appellant's Exhibit No. 42). Surely, the Board is justified in accepting a construction put upon the requirements of the

¹³ 110 Ct. Cl. 551, 628 (1948).

¹⁴ 109 Ct. Cl. 517 (1947).

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contract by the contractor itself, a construction that is, moreover, entirely consistent with their plain terms.

Accordingly, the contractor is not entitled to recover the full amount of the \$126,525.30 which it claims. The Government is correct in maintaining that this claim includes a variety of items which would not in any event be allowable. The contractor is entitled to additional compensation, if at all, only under the pay items for borrow and overhaul. As the record shows that the overrun in borrow was less than 6 percent, the contractor is not entitled to any equitable adjustment under this item. Although the record shows that the contractor was paid for overhaul, it does not show the final amount of the overhaul in terms of cubic yard miles. If, indeed, there was an overrun in the estimated quantities of overhaul, and this overrun exceeded by 25 percent the bid quantities, the contractor would be entitled to an equitable adjustment by reason of the excess. Indeed, counsel for the Government concedes as much. The claim is, therefore, remanded to the contracting officer to determine whether there was an excessive overrun, and, if so, to determine its amount upon the presentation of proper proof by the contractor. Such a determination shall be subject to a further right of appeal to the Board if the contractor should be dissatisfied with the contracting officer's determination.

3. *The Deletion Claim*

Item 1: This item of the claim is for the alleged costs of preparatory work on plant done prior to the deletion of item 100 (1) on April 23, 1954. In its letter of February 27, 1955, to the Commission, this claim was stated by the contractor to be in the amount of \$44,844.53, to which was added 15 percent for profit, making the total of the claim \$51,571.21. In its letter of April 13, 1955, to the Commission, the claim was, however, revised downward somewhat to a total amount of \$47,250.04. Subsequently, the claim was further reduced, and in its opening brief the contractor offered to turn the plant over to the Government for \$37,661.08, or to retain the plant, and allow the Government a credit of \$7,972.53 for its salvage value, which would reduce the claim to \$29,688.55.¹⁵ In this amount an allowance of 15 percent was included for profit. (Appellant's Exhibit No. 57, p. 3; Appellant's Reply Brief, p. 12.)

The contractor's preparatory work on the plant and the items entering into its composition were detailed by Aner W. Erickson, the con-

¹⁵ This was done apparently pursuant to a statement of intention included in the contractor's letter of February 27, 1955, to the Commission, but no comment concerning this intention was made by the Government.

tractor's Alaska District Manager in his testimony, and further details are supplied by the contractor's exhibits. Erickson testified that "the first elements of equipment" for the performance of the deleted item, were put together in 1953 and consisted of a trap, which was constructed in the contractor's Anchorage shop, a Barber-Greene conveyor and a buzzer screen, which formed a highly mobile plant. (Tr., p. 55.) Although he also testified that these three pieces of equipment were purchased specifically for item 100 (1), he revealed that two of them, the trap and the Barber-Greene conveyor had been used in 1953 for "loading out borrow material." (Tr., pp. 57-58.) He explained that they had been used for this originally not contemplated purpose because "changes in haul and so forth and so on unbalanced our other equipment spreads that we could not keep up adequate performance of hauling borrow." (Tr., p. 58.) In all, 30,850 cubic yards of material was loaded with the equipment. However, he added that the purchase of equipment in addition to that already acquired was contemplated even in 1953, although not immediately. When finally ordered in 1954, this equipment turned out to be a portable screening plant manufactured by the Idaho Sprocket and Machine Company. "I can't say," Erickson testified, "*at the date of bidding the work* it was contemplated we would buy from Idaho Sprocket and Machine but we believed additional equipment certainly would be required to handle the yardage in the bid quantity." (Tr., p. 59, italics supplied.) Indeed, he and his colleagues believed for a considerable portion of the 1953 season that the work on the contract could be completed in its entirety in 1953, and that they could get along with the trap, Barber-Greene conveyor and the buzzer screen with which they had had good results in their operations in Montana. (Tr., p. 60.) But, they finally concluded that the buzzer screen could not possibly screen out everything that had to be screened out, and that a special plant would be necessary because of lack of gradation in the material, the large quantity of this material, and the fact that the borrow pits were strung out over 45 miles, which would require even more mobile equipment. (Tr., p. 61.) Since they soon became convinced that they could not complete the job in 1953, they did nothing immediately, and the matter of additional equipment did not become "an important subject of discussion" until December 1953. (Tr., p. 62.) Indeed, authority to purchase the Idaho Sprocket screening plant to supplement the existing rock trap set up was not requested in the contractor's organization until January 29, 1954 (Appellant's Exhibit No. 2), and the actual purchase order was not issued until March 23, 1954, which was about a month before item 100 (1) was deleted.

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A little later in his testimony Erickson modified his account of the equipment purchase plans in a rather important respect. He now asserted that the purchase of all elements of the plant had "originally" been contemplated but that after getting the contract they learned of the effectiveness of the buzzer screen in Montana, and decided to try it. Nevertheless, they soon concluded that it would not be adequate. "The pits were of a nature," the witness explained, "that there was no question in our minds, but we would have to go back to the originally contemplated idea of this elaborate screening plant." (Tr., pp.70-71.)

In any event, as soon as the contractor learned of the deletion of item 100 (1), it attempted to cancel the Idaho Sprocket order. This company had, however, completed it, and some of the units had already been shipped by April 25, 1954. It took the position in a letter of May 3, 1954 to the contractor (Appellant's Exhibit No. 7) that since the equipment was custom-built for the job, it would be very difficult to dispose of it to any other user, and declined to restock the equipment. At the time of the deletion of item 100 (1) part of the Idaho Sprocket plant was in Boise, Idaho, and another part in Seattle, Washington. The contractor decided to have the whole plant shipped to the job-site in Alaska in the hope that the Government might still restore the deleted item. (Tr., pp. 77-78.) The freight charges on the shipment of part of the plant from Boise to Seattle was included in the contractor's claim but the freight charges for shipment of the plant from Seattle to Alaska were not included therein. (Tr., p. 85.)

In addition to the use made of the trap and Barber-Greene conveyor in loading out the 30,850 cubic yards of material, further use of various parts of the total plant was made both in 1954 and 1955. In June 1954, approximately 150 cubic yards of material was processed for aggregate with the screening plant under another contract involving Section "G" of the Richardson Highway. Then approximately 1,200 cubic yards of material was processed for aggregate in the bridges under still another contract involving Section "D" of the Richardson Highway. Early in September the equipment was sent to Eileson Field where an attempt was made to integrate parts of the plant with the crushing and screening set-up for the performance of a contract with the Corps of Engineers. But the contractor asserted in its letter of April 18, 1955, to the Commission that the attempt was unsuccessful and that the equipment was used only for a sufficient period of time to produce samples for fracture and gradation testing (Appellant's Exhibit No. 18). Various units of the plant were still at Eileson Field at the time this letter of the contractor was written. Appellant's Exhibit No. 57 shows the extensive use made in 1955 of the various items

of equipment making up the Tonsina Screening Plant. Use was made of the parts of the plant not only at Tonsina and Eileson but at Black Rapids and Naknek. The rental allowances made in this exhibit for use of various items of the plant total no less than \$9,410.08, and apparently constitute the principal reason for the final reduction in the amount of the claim. Although the complete plant has never operated as a complete unit, as Erickson testified (Tr., p. 93), use has been made of virtually all of its component parts.

The cost of the Idaho Sprocket Screening Plant to the contractor was only \$19,375.16. The trap which the contractor built in its Anchorage shop cost it \$6,711.81, and the cost of the Barber-Greene conveyor and the buzzer screen was \$7,430.00. Apart from an additional \$4,275.50, representing the cost of motors, switches, panels, switchboard and the like, the balance of the contractor's equipment claim consists of charges for assembly of equipment, move-in costs, ownership costs, overhead and profit. The total costs claimed amount to almost 20 percent of the \$210,000 bid for the unit of the work for which the plant allegedly was provided.

Erickson conceded in his testimony that item 100 (1) could have been performed with a plant of standard manufacture, such as a Master-Tandem or Cedar Rapids screening plant, which, being equipped with replaceable screens for handling different sized products, could have been adapted to the requirements of the job, and that such a plant could have been purchased at a cost of about \$50,000. Indeed, the witness revealed that contractor had a Master-Tandem plant in its equipment pool in Anchorage in 1953! He insisted, however, that a standard plant would not have produced the required material at a price which would have enabled the contractor to meet its low bid of \$1.20 a cubic yard. Indeed, he testified that with a standard plant the cost would have been \$5.00 a cubic yard. (Tr., pp. 71, 214-15, and 243-45.)

In his findings and decision of May 16, 1955, the contracting officer included the following finding:

As to the allegedly "highly specialized" screening equipment, the record shows that the contractor chose to ignore the telephone and telegraphic orders to discontinue preparatory work for Item 100 (1), or he chose to consider that the screening plant was not preparatory work exclusively for this item. The screening plant was completed and shipped to Alaska where it was apparently assembled with other component parts. The plant has been used wholly or in part for processing material on at least three projects, one of which was not under Alaska Road Commission jurisdiction. It therefore appears that, although the screening plant may have been assembled with the idea that its primary use would be on Item 100 (1) of this contract, it was useful for other purposes and continues to have potential uses.

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On the basis of his findings the contracting officer concluded that "the damage to the contractor, if any, arising from mobilization of the equipment for item 100 (1) of this contract, is indeterminate to the extent that it is in the nature of unliquidated damages and is therefore beyond his authority to adjudicate."

The contracting officer was in error in concluding that the claim was one for unliquidated damages merely because no adequate proof had been presented to him concerning the cost of the preparatory work on plant. The test is rather whether the claim is one for breach of contract.¹⁶ In the case of this item of claim the contractor was entitled to an equitable adjustment under the "changes" article of the contract for the necessary preparatory work on the plant, notwithstanding the special provisions of articles 4 and 9 of the standard specifications, since item 100 (1) was not deleted merely because of unanticipated field conditions. While the Board cannot accept the contracting officer's finding that the contractor ignored the notification of the deletion of item 100 (1), and proceeded with the completion of the Idaho Sprocket plant despite the notification, the Board must find that the contractor was not justified in shipping the plant to Alaska after it had been notified of the deletion. This action undoubtedly narrowed the market for the Idaho Sprocket plant, and seriously impaired its salvage value.

It is the essence of this item of the contractor's claim that the Idaho Sprocket plant was necessary to enable it to meet its bid price. This contention is stated in the Appellant's Reply Brief as follows: "The acquisition of such equipment, capable of producing the Select Borrow at a price below the bid price, was the very basis for the low unit at which appellant contracted to supply this substantial item of the contract." In view of Erickson's testimony, the Board must find that the bid was not made upon the expectation that the Idaho Sprocket plant would be acquired for its performance. The Board must find, on the contrary, that the contractor intended at first to operate with a plant consisting of the trap, Barber-Greene conveyor and the buzzer screen, and that the decision to acquire the Idaho Sprocket plant was not made until a few months before the deletion of item 100 (1). Moreover, the Board must also find that the trap-conveyor-buzzer screen plant was either not acquired for the sole purpose of performing the deleted item, or that it was abandoned as the instrument for the performance of the item long before its deletion. In other words, the plant was either a generally useful item, or an unsuccessful experi-

¹⁶ *Continental Illinois National Bank & Trust Co. of Chicago et al. v. United States*, 128 Ct. Cl. 631, 640 (1953).

ment. In either case, this plant must be left out of account in determining the equitable adjustment to which the appellant is entitled. To put it in another way, there are really two plants involved in this item of the contractor's claim, the trap-conveyor-buzzer screen plant and the Idaho Sprocket plant, and the contractor cannot transfer to the Government the costs of both of them.

The Government contends that the contractor is entitled to recover on this item of the claim at most "a sum equal to one year's annual rental of a plant of standard manufacture" (Answer Brief of the Department, p. 8). The Board cannot accept, however, this contention, notwithstanding the elements of weakness in the contractor's case. While the Government has shown that the work could have been performed by adopting a plant of standard manufacture, it has failed to refute the testimony of Erickson that the production of the material with such a plant would have cost the contractor \$5 a cubic yard. The contractor was not bound to perform this unit of the contract at a loss, and the Board must hold, therefore, that the contractor was not unreasonable in ordering such as a special plant as the Idaho Sprocket. Even though the use of such a plant may not have originally been contemplated by the contractor, it was ordered nevertheless prior to the deletion of item 100 (1). As the trap-conveyor-buzzer screen plant must be left entirely out of account in calculating the amount of additional compensation to which the contractor is entitled, the contractor is entitled to recover only the cost of the Idaho Sprocket plant, which the record shows to be \$19,375.16.¹⁷ On this amount, however, the Government should be allowed a credit for the use of parts of the plant for other purposes, as shown by the present record, and for the present salvage value of the plant taking into consideration not only the market in Alaska but in the continental United States. As this amount cannot be determined from the present record, however, this item of the claim is remanded to the contracting officer for determination upon the best expert evidence made available to him by counsel for the Government and the contractor. The contractor will have a further right to appeal to the Board from the determination made by the contracting officer. If such an appeal is taken, a record adequate for its disposition shall be transmitted to the Board.

Items 2 and 3: These items of the deletion claim are essentially similar and will, therefore, be treated together.

¹⁷ The contractor is not entitled to any allowance for profit on the purchase of the plant.

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Item 2, which is in the amount of \$63,523.68, is for the alleged costs of finishing the subgrade to standards acceptable to the Commission, from Mile 57.4 to Mile 58.4, and Mile 60.6 to Mile 82.1.

Item 3, which is in the amount of \$29,423.80, is for the alleged estimated costs of finishing the subgrade to standards acceptable to the Commission, from Mile 50.8 to 57.4, and Mile 58.4 to Mile 60.6.

The subcontractor who performed this last-mentioned portion of the contract evidently experienced financial difficulties and the prime contractor completed the work. The unavailability of the books of the subcontractor made it necessary for the prime contractor to estimate its costs.

There is also claimed on each of the two parts of this item of the deletion claim a 15 percent profit, which totals \$13,942.14 and makes the total amount of items 2 and 3 \$106,889.62.

The main basis of the claim of the contractor with respect to items 2 and 3 are that the sudden deletion of item 100 (1) prevented the use of select borrow topping material to finish off the rough subgrade and that the deletion of this item caused the contractor to do extra work with respect to the subgrade, in that (1) it was forced to use unsuitable and unspecified material because the Government neither permitted the overhaul of suitable material for the purpose of preparing the subgrade from available pits nor designated pits from which such suitable material could have been obtained without the objectionable overhaul; and (2) it had to prepare a new subgrade without reasonable tolerances, and that this subgrade conformed in all respects to item 42 of the standard specifications entitled "Finishing Earth Grade Roads," which provided for a new subgrade. (Tr., p. 97.) This item was not included, however, in the specifications applicable to this contract, and no written change order or order for extras was issued or requested in accordance with the provisions for extras.

The record does not substantiate the contentions of the contractor and, consequently, the contractor has not met the burden of proving by a preponderance of the evidence that the Government demanded of the contractor anything beyond what it was required to do under the contract. The Board finds that the roadway which was constructed is substantially identical to the roadway provided for by the contract, specifications and drawings.

The contractor's difficulties in finishing the subgrade were not caused by the deletion of item (1) but by its own haste and inadequacies in working on the subgrade in 1953. As already related, the contractor originally planned to complete most, if not all of the

work in 1953,¹⁸ and in accordance with this plan pushed the work on the subgrade too fast to permit it to be brought to any high degree of refinement. It relied rather upon the placing of the Select Borrow Surface Course to make up for any deficiencies. As Erickson testified:

With Bid Item 100 (1) being in the contract the contractor made no great or extensive effort to build the grade produced in that season to any high degree of refinement. In other words, with the surfacing course to come in we proposed to haul merely the borrow from allowable haul pits of selected material obtained in it along with the surfacing processing out to that grade and to place that material in advance of laying down the surfacing material as a preparatory step to get the subgrade up to the requirements that the Alaska Road Commission might desire. (Tr., p. 54.)¹⁹

It was the intention of the contractor, in placing the select borrow to correct the roughness of the subgrade, to charge the Government the price for ordinary borrow only. (Tr., pp. 100-01.) However, Erickson admitted in cross examination that his intentions with respect to the correction of the subgrade were never communicated to the contracting officer. (Tr., pp. 219-20.)

The Select Borrow Surface Course was intended to provide material for the layer above the subgrade, and the contractor's plans were not, therefore, in accordance with the requirements of the contract. In his findings and decision of May 3, 1955, the contracting officer found that the irregularities in the subgrade could not be dressed up with the select borrow. "One of the primary purposes of the Select Borrow Surface Course where used," he stated, "is to make it possible for the Government to maintain over a period of years, the driving surface at a relatively high standard with a relatively low expenditure. To do this it is necessary to be able to scarify and reprocess the surface. If the subgrade is uneven, the scarifying is made difficult, large rocks are dug from the subgrade and the justification for the select surface course is nullified." The contractor has offered no evidence contradicting this finding. In any event, the Government cannot be expected to pay for the miscarriage of any plans which the contractor might have made for incidental uses of the Select Borrow.

The contractor complains particularly that it was not allowed reasonable tolerances in finishing the subgrade. The contract does not contain specific provisions for tolerances with respect to the finish of a subgrade, but several items in the standard specifications require conformity with the lines and grades shown on the plans. (Item

¹⁸ According to Erickson's testimony, 81 percent of the total work was completed in 1953, and the contractor missed by a fraction of a percent finishing all the work in 1954.

¹⁹ See also Statement to same effect in the second full paragraph on page 2 of Erickson's letter of June 18, 1954 to the Alaska Road Commission (Appellant's Exhibit No. 10).

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29-1.1 relating to fill material placed on embankments; item 41-1.1 which contains similar language relative to preparation and filling of subgrade, and article 5.3 which relates to all finished surfaces.) These provisions should be interpreted as requiring reasonable variations, and even in the absence of specific provisions, a reasonable variation or tolerance should be allowed.

There is conflicting testimony as to the extent of the tolerances allowed by the field engineers to whom the contracting officer delegated the determination of tolerances. There was testimony of contractor's witnesses that it was difficult to ascertain what the tolerances were and sometimes the tolerance was one-tenth or two-tenths of a foot. (Tr., pp. 115-123, 129-130, 255-257, 270-272; also, see p. 27.) The inspector of the Commission testified that the blue tops²⁰ had to be reached but could be exceeded by one-tenth to four-tenths of a foot where soil conditions required such fill to achieve a stable road; and that in other cases variations above or below grade of one-tenth of a foot were always allowed, and sometimes as much as four-tenths of a foot. (Tr., pp. 310, 345-346.) Moreover, part of the difficulties of the contractor in meeting tolerances were due to the rough manner in which it had prepared the subgrade. As the contracting officer found:

It is to be noted that a roadbed can be built to rather close tolerances with coarse material, including rock excavation, if it is brought to grade and compacted as a part of the initial grading operation. However, if the grade is built carelessly and unevenly, trueing it up later with the same material becomes a troublesome and costly operation. A 4" rock will readily push down to grade in a soft fill during the initial compacting but it is impossible to bring a 2" dip to grade with the same rock after the grade has been compacted. (Paragraph 21 of the findings and decision of May 3, 1955.)

It is the conclusion of the Board that it was not unreasonable for the tolerances to be flexible in the light of the varying conditions and that the tolerances were not unreasonable.

Moreover, although it is the essence of the contractor's case that it was required to conform in all respects with item 42 which was not a part of the contract, there is no evidence that the appellant conformed to the requirements of the specifications for this item, such as scarifying to a depth of 6", leaving no material larger than 2" in the top 4 inches of the finished road surface, or finishing the grading with a grading machine supplemented by handwork where necessary.

²⁰ The blue tops are stakes that indicate the designed grades. As explained by Rutherford M. Haugan, the contractor's Project Superintendent: "A blue top is a stake that is set in the shoulder line of a grade or of a roadway to show the exact line and the exact finish grade of that shoulder. The reason it is called blue top is that they are marked blue on top of the stake and they are merely for the purpose of building and for the use of grader operators in finishing the roadway to that degree of grade." (Tr., p. 255.)

(See item 42-1.1 and 42-3.1.) Furthermore, the Government is correct in contending that, if the contractor was indeed required to perform in accordance with item 42 of the standard specifications, the claim would be barred by its failure to secure an extra work order as required by article 5 of the contract and article 9.4 (b) of the standard specifications.

In so far as the contractor's claim is based on its difficulties in obtaining and hauling suitable borrow, it is necessarily disposed of by the findings and conclusion of the Board with reference to the borrow claim.

Item 4: This item of the claim, which is in the amount of \$26,938.99, is for alleged added costs of the contractor attributable to the prolongation of the work into the spring of 1955. The amount claimed, which includes in addition to general overhead an allowance of 15 percent for profit, consists principally of the salaries of the contractor's Project Superintendent, Project Engineer and Project Office Manager from October 30, 1954 through May 23, 1955 that alone total \$18,208.39. The balance of the claim consists of labor costs for demobilization in 1954 and mobilization in 1955, and various items of equipment expenses.

The contractor puts the blame on the Government for the prolongation of the work into 1955 for a variety of reasons. It alleges, in the first place, that except for the added work and difficulties attendant upon the deletion of item 100 (1) and the failure of the Government to furnish proper borrow material the work would have been completed in 1954 with no greater effort than was expended in 1955. It alleges, in the second place, that the Government failed to supply it with a check list of claimed deficiencies which it had requested and then ordered a winter shut-down on October 26, 1954. Faced with this shut-down, and fearing that the Government would exercise its power under the specifications to order the repair of winter maintenance,²¹ the contractor alleges that it decided to keep its key personnel on the job, as well as necessary equipment, during the winter shut-down period.

In his findings of fact and decision the contracting officer pointed out that this claim was being advanced in the face of a large engineering expenditure by the Government to enable the contractor to complete the work in 1953.²² He also found that the work was 99 percent complete at the time of the winter shut-down in 1954, and that the failure of the contractor to complete the work entirely that year was

²¹ This obligation was imposed on the contractor by article 4.4 of the standard specifications as supplemented by the special provisions.

²² The contracting officer testified at the hearing that this expenditure amounted to \$316,000.

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due to the fault of the contractor in directing equipment and personnel to other contracts and not giving proper supervision to the work. He also found that the contractor had employed an unsatisfactory subcontractor, and had allowed the subcontractor to move off the job before it had been completed. Finally, he found:

It is unrealistic to contend that it was necessary to spend \$18,430.16 on salaries to retain key personnel to finish the job in the spring when the semi-final estimate withheld \$20,000 to insure completion of the remaining work in 1955. The contractor could, by remote control of their superintendent at the nearby Paxson-Rapids job, direct the small amount of final work remaining to be done.

The Board must conclude that the contracting officer was entirely justified in rejecting this item of the contractor's claim. The record shows that the project was completed in the spring of 1955 after only 3 weeks of work. Only five or six men and a few pieces of equipment were required.²³ The contractor's fears of exaggerated demands of the Government for repair of winter maintenance proved entirely groundless, for none were made. (Tr., pp. 162-63, and 263.) Moreover, it had received oral assurances in 1954 that such demands would not be made. Finally, the record shows that the contractor did not even request a list of deficiencies that would prevent final acceptance of the project until October 20, 1954 (Appellant's Exhibit No. 29), and that when the project was shut down for the winter less than a week later there was already so much snow on the ground that final inspection and acceptance of the project would have been impossible (Appellant's Exhibits Nos. 31, 32 and 33). The contractor was improvident in maintaining three high-salaried employees over the winter of 1954-55 to finish off a job that was virtually completed, and to ward off a fear that was entirely groundless.

In so far as this item of the claim is based upon the difficulties of the contractor in finishing the subgrade, the contention has already been disposed of.

Although the Board has considered the merits of this item of the claim, it would seem that it is a claim for unliquidated damages, since it is based on the alleged delay of the Government in discharging its duty of inspection under the contract or upon other alleged breaches of contract. The contracting officer could not entertain or settle such a claim, and the Board also lacks jurisdiction to determine it.

To summarize: All four items of this claim lack merit and are rejected except for item 1, which is allowed to the extent indicated. The basic fallacy underlying all four items of the claim is that, except for the preparatory work on the plant, there is no relation of cause

²³ This is the testimony of Rutherford M. Haugan, the contractor's Project Superintendent. (Tr., pp. 259, 263.)

and effect between the deletion of item 100 (1) and the consequences that are attributed thereto. It would indeed be extraordinary if the contractor were to be held to be entitled to additional compensation in the amount of \$167,970.44 by reason of the deletion of a contractual item for which the estimated price was \$210,000.00. Despite the deletion, the contracting officer has found that the contractor had earned under the contract exclusive of any settlement no less than \$2,067,725.88, which was almost as much as the \$2,083,853.00 that was the estimated contract price.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decisions of the contracting officer, dated May 3 and May 16, 1955, and July 7, 1955, denying the claims of the contractor, are affirmed as modified herein, and the contracting officer is directed to proceed as outlined above.

THEODORE H. HAAS, *Chairman.*

I concur:

WILLIAM SEAGLE, *Member.*

CLEAR GRAVEL ENTERPRISES, INC.

A-27449

Decided May 31, 1957

Mining Claims: Lands Subject to—Mining Claims: Special Acts

Land which, in 1946, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, a mining claim located on such land is invalid.

Administrative Procedure Act: Exemption From—Mining Claims: Determination of Validity

A mining claimant is not entitled to a hearing under the Administrative Procedure Act on the validity of the claim where it appears on the face of the record that the claim is invalid because the mining location was made at a time when the land included in the claim was embraced in an existing oil and gas lease issued under the terms of the Mineral Leasing Act, and the mining claimant had failed to comply with the provisions of the act of August 12, 1953.

United States v. Keith V. O'Leary et al., 63 I. D. 341 (1956), distinguished.

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APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Clear Gravel Enterprises, Inc., has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated November 16, 1956, which affirmed the decision of the land office manager, Reno, Nevada, dated July 11, 1955, declaring the Clear Gravel No. 9 mining claim null and void because at the time the claim was located the land involved was included in an oil and gas lease and therefore was not subject to location under the mining laws; and for the further reason that the appellant did not comply with the provisions of the act of August 12, 1953 (30 U. S. C., 1952 ed., Supp. III, secs. 501-505), and the act of August 13, 1954 (30 U. S. C., 1952 ed., Supp. III, secs. 521-531), which provided a means for validating mining claims in conflict with oil and gas leases.

The record shows that the claim was located on January 21, 1946, for the NE $\frac{1}{4}$ sec. 20, T. 21 S., R. 60 E., M. D. M., Nevada. At that time this land was embraced in oil and gas lease Carson City 022240 issued pursuant to an application filed April 13, 1945.

In its appeal to the Secretary the appellant asserts that when the claim was located the appellant and its grantors made a discovery of gravel deposits; that the land was at that time chiefly valuable for the mining of gravel for construction purposes; that there was no evidence of any drilling or work of any kind upon the oil and gas lease; that no record of oil and gas lease Carson City 022240 was filed or recorded in the Recorder's office of Clark County, Nevada; that ever since the location was made the appellant and its grantors have filed each year their proofs of labor upon the claim and have done at least \$100 assessment work each year in addition to the mining operation.

In another case involving other mining claims located by the appellant in the same township, *Clear Gravel Enterprises, Inc., A-27287* (March 27, 1956), at a time when the lands included in the locations were also embraced in various oil and gas leases, the Department held that these identical contentions were without merit—

* * * in that Federal oil and gas lease holders are not required to record their leases on the county records; all of the oil and gas leases antedate the year 1946 which is the year the appellant alleges it located the claims; and finally the appellant failed to comply with the terms of the acts of Congress (*supra*) [reference to acts of August 12, 1953, and August 14, 1954] which could have validated the claims. The Department has held that except in situations where a mining claimant complies with the provisions of the act of August 12, 1953, mining claims located on lands which were included in oil and gas leases or allowable applications for such leases under the Mineral Leasing Act at the time the mining claim was located are invalid. *R. L. Greene et al., A-27181* (May 11, 1955).¹

¹ For further authority to the effect that a mining claim cannot be located on land embraced in an oil and gas permit or lease see: *Joseph E. McClory et al.*, 50 L. D. 623, 626 (1924); *Filtrol Co. v. Britton and Echart*, 51 L. D. 649, 653 (1926); *H. Leslie Parker et al.*, 54 L. D. 165, 173 (1933).

In view of the Department's previous decision of March 1956 on these contentions, no further comment need be made here.

The appellant also contends in this appeal that the enactment of the act of August 12, 1953, was not known to the appellant or its grantors, and hence they had no opportunity to comply with the provisions of the act; that the act is contrary to the provisions of the fifth amendment to the United States Constitution in that it deprives the appellant of property, i. e., mining claims, without due process of law in that no actual notice was given it of the law and no opportunity for a hearing afforded it.

As discussed in the Acting Director's decision, after the passage of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 181 *et seq.*) the Department uniformly held that mining claims could not be located on lands covered by an outstanding permit or lease, or allowable application for a noncompetitive lease (see cases in fn. 1). The act of August 12, 1953, provided that mining claims located subsequent to July 31, 1939, and prior to January 1, 1953, on public domain lands included in an oil and gas lease or application for a lease could be validated, provided the owner of the claim filed an amended notice of location stating that the notice was filed pursuant to the provisions of the act and for the purpose of obtaining the benefits thereof. The claimants were required to file an amended notice within 120 days after August 12, 1953.

The act of August 12, 1953, therefore, was recognition and approval by Congress of the Department's frequent ruling that mining claims which were located on lands included in an existing oil and gas lease or an oil and gas lease application were void. The act, therefore, provided a means whereby these otherwise void claims could be validated. In other words, the appellant and its grantors had nothing in the way of property rights prior to the passage of the act of August 12, 1953; consequently, the act could not possibly deprive them of property without due process.

As for the appellant's contention that it was not aware of the act and therefore was not given the opportunity to comply with it, the simple answer is that a citizen is chargeable with knowledge of the law affecting him, and the mere fact that he had no actual notice of a law does not render the law unconstitutional.

The appellant's final contention is that the action of the manager in declaring the mining claim null and void did not comply with requirements of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*) in that such action was made without proper notice and an adequate hearing contrary to due process of law, and because the

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manager is not an officer authorized by section 7 of the act to preside at hearings under the act. The appellant cites the Department's decision in *United States v. Keith V. O'Leary et al.*, 63 I. D. 341 (1956), in support of his contention.

The appellant's contention is without merit and is not supported by the decision in the *O'Leary* case. In that case the manager held that charges brought by the Government against a mining claim located by O'Leary and Donald K. Moore had been sustained at a hearing before the manager and held the claim invalid. The charges brought were on the grounds (1) that the land embraced in the claim was non-mineral in character and (2) that minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.

The appellants O'Leary and Moore contended that in a determination as to whether there had been a discovery of valuable minerals on the claim, they were entitled to a hearing on the question presided at by an examiner appointed under section 11 of the Administrative Procedure Act, and that a hearing presided over by the manager of the land office violated the act.

The Department held that even though there is no statutory requirement that a hearing be held to determine the validity of a mining claim, inasmuch as a mining claim is a claim to property, the claim may not be declared invalid without proper notice and an adequate hearing in accordance with due process of law, and that since a hearing was necessary it must conform to the requirements of the Administrative Procedure Act.

The decision in the *O'Leary* case was based on the fact that the only issues in the case were whether or not the land embraced in the Moore-O'Leary claim was mineral in character and whether a valid discovery had been made. These issues were clearly questions of fact upon which the appellant should be permitted to present his evidence before a hearing examiner authorized by the Administrative Procedure Act. A land office manager is not an officer authorized by section 7 of the act.

In the present case there are no questions of fact whatsoever. The appellant does not deny that its claim was located after an oil and gas lease had been issued on the land embraced in the claim, nor is there any allegation made that the appellant complied with the act of August 12, 1953, *supra*. Since these facts are admitted, as a matter of law the claim is null and void. There is no necessity for a hearing in such a case, and the rule announced in the *O'Leary* case is clearly not applicable.

The appellant included with its appeal to the Secretary a petition for rehearing of the Department's previous decision, *Clear Gravel Enterprises, Inc.*, A-27287 (March 27, 1956), in view of the *O'Leary* decision. As previously mentioned, that appeal involved other claims owned by the appellant in the same township as the land involved in this appeal. The appellant bases his petition for rehearing on the contentions that the act of August 12, 1953, is violative of the fifth amendment because it does not provide actual notice to a mining claimant or a hearing and that the *O'Leary* decision requires that a hearing be held to determine the validity of those claims under the provisions of the Administrative Procedure Act. Inasmuch as the decision in this appeal has determined that there is no violation of the fifth amendment and that the Administrative Procedure Act does not apply where a mining claim is null and void on its face and as a matter of law, the petition for rehearing is denied.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

STEELCO DRILLING CORPORATION

A-27435

Decided May 31, 1957

Oil and Gas Leases: Drilling—Oil and Gas Leases: Termination

Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, a competitive lease in its extended term by reason of production terminates by operation of law when production ceases unless diligent drilling operations are being conducted on the lease at that time, in the absence of an order under section 39 suspending operations and production on the lease.

Oil and Gas Leases: Production

Production from a lease may properly be regarded as having ceased on the final day of the last month during which any production from the lease was reported where the exact date of cessation of production within that month is not known.

Oil and Gas Leases: Extensions

Under the Mineral Leasing Act, as amended by the act of July 29, 1954, if production ceases on a competitive lease which is in an extended term by reason of production, the lease terminates by operation of law unless: (1) within 60 days after cessation of production, reworking or drilling operations are begun on the lease and thereafter conducted with reasonable diligence during the period of nonproduction; or (2) an order or consent of the Secre-

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tary suspending operations or production on the lease has been issued; or (3) the lease contains a well capable of producing oil or gas in paying quantities and the lessee places the well on a producing status within a reasonable time, not less than 60 days after notice to do so, and thereafter continues production unless and until the Secretary allows suspension.

Oil and Gas Leases: Extensions

Where the holder of a lease which is in its extended term because of production performs some reworking operations following the cessation of production but fails to continue the operations, he is not entitled to an extension of his lease.

Oil and Gas Leases: Extensions

Where production from a lease ceases because the well is no longer capable of production, the lessee is not entitled to the benefits of the provision in section 17 of the Mineral Leasing Act which provides that no lease on which there is a well capable of production shall expire because the lessee fails to produce it unless the lessee is allowed not less than 60 days after notice to place the well on a producing status.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Steelco Drilling Corporation has appealed to the Secretary of the Interior from a decision of November 2, 1956, by the Director of the Bureau of Land Management holding that competitive oil and gas lease Cheyenne 080570 terminated by operation of law on July 31, 1954. The lease was issued on June 1, 1949, to E. M. Carlson on 120 acres of land in Big Muddy Oil Field, Wyoming, for a term of 5 years and so long thereafter as oil or gas was produced in paying quantities (section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946; 30 U. S. C., 1952 ed., sec. 226). An assignment of the lease to the Steelco Drilling Corporation was approved on July 26, 1949.

In a decision of February 15, 1956, the manager of the Cheyenne land office held that the lease terminated by operation of law on July 31, 1954, inasmuch as production ceased in July 1954, after the lease was in its extended term by reason of the discovery of oil on the lease on June 27, 1950, during its primary term; and that, since July 1954, the lease has neither produced nor contained a well capable of producing in paying quantities and no reworking or drilling operations to restore production were carried on within 60 days after production ceased.

In its appeal to the Director from the manager's decision, the lessee requested that the lease be reinstated and that the lessee be given an opportunity to restore production or at least be allowed to remove the casing and other installations in the well.

The well on the lease, drilled in 1950, was apparently produced until some time in July 1954. In March 1954 production diminished and

"sandfracing" (sand fracturing) operations were conducted in an attempt to increase production, but the operations were unsuccessful. Reports by the Geological Survey indicate that the one well on the lease produced only nine days (a total of 21 barrels of oil) in July 1954, and that since July 31, 1954, the lease has not produced and there has been no well on the lease capable of producing in paying quantities. The records of the Geological Survey do not show the exact date in July 1954 on which production ceased and the appellant cannot locate its production records for July 1954, but it has reported no commercial production from the lease since the report of nine days production in July 1954.

Ordinarily, a lease issued under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, which is in an extended term by reason of production, expires when production ceases (in the absence of an order under section 39 (30 U. S. C., 1952 ed., sec. 209) suspending operations and production) because section 17 provides that leases issued thereunder shall be for a primary term of 5 years and shall continue so long thereafter as oil or gas is produced in paying quantities. Before July 29, 1954, the only provision of the Mineral Leasing Act which would have prevented expiration of the appellant's lease in the circumstances of this case was the provision in section 17 that a lease "upon which there is production during or after the primary term shall not terminate when such production ceases if diligent drilling operations are in progress on the land under lease during such period of nonproduction." If production from the appellant's lease had in fact ceased before July 29, 1954, the lease could have continued past the date of cessation of production only if diligent drilling operations were being conducted on the lease. However, it is unnecessary to determine whether such operations were being conducted because the appellant has been given the benefit of the doubt and it has been assumed, in effect, that production continued until July 31, 1954, and ceased on that date. Of course, if production had ended before July 29, 1954, and there had been no diligent drilling operations on the lease, the lease would have terminated by operation of law on the cessation of production.

On July 29, 1954, the Mineral Leasing Act was amended in several ways, including the amendment of provisions governing the termination of leases on which production ceases (30 U. S. C., 1952 ed., Supp. III, secs. 187a, 188, 226, 226e). One of the provisions amended was the provision quoted above relating to the extension of a lease upon which diligent drilling operations are being conducted. This provision was amended by subsection (1) of the act of July 29, 1954, to read as follows:

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Any lease issued under this Act which is subject to termination by reason of cessation of production shall not terminate if within sixty days after production ceases, reworking or drilling operations are commenced on the land under lease and are thereafter conducted with reasonable diligence during such period of nonproduction. No lease issued under the provisions of this Act shall expire because operations or production is suspended under any order, or with the consent, of the Secretary of the Interior. No lease issued under the provisions of this Act covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same, unless the lessee is allowed a reasonable time, but not less than sixty days after notice by registered mail, within which to place such well on a producing status: *Provided*, That after such status is established production shall continue on the leased premises unless and until suspension of production is allowed by the Secretary of the Interior under the provisions of this Act.

The quoted portion of subsection (1) of the act of July 29, 1954 (hereinafter referred to as the act of July 29) sets forth three distinct and separate sets of conditions or circumstances in which a lease will not expire even though production has ceased and the lease is in an extended term by reason of production. The second condition mentioned in subsection (1), that no lease shall expire because of the suspension of operations or production under any order or with the consent of the Secretary, has no relevancy in the instant case, there having been no consent or order of the Secretary suspending operations or production on this lease.

The first provision of subsection (1), that a lease on which production has ceased will not terminate if within 60 days after production ceases, reworking or drilling operations¹ are begun on the leasehold and carried on thereafter with reasonable diligence during the period of nonproduction, allows a period of 60 days after cessation of production within which a lessee may begin reworking or drilling operations which, if continued during the period of nonproduction, will prevent expiration of a lease that would otherwise expire. 43 CFR 192.121 (a), issued pursuant to the first provision of subsection (1), provides:

A lease which is in its extended term because of production shall not terminate upon cessation of production if, within 60 days thereafter, reworking or drilling operations on the leasehold are commenced and are thereafter conducted with reasonable diligence during the period of nonproduction.

In a decision of June 22, 1956, by the Acting Director of the Bureau of Land Management, the manager's decision was suspended for 30 days within which time the appellant was requested to submit satisfactory evidence of: (1) the exact date of cessation of production of

¹ The phrase "drilling operations" refers to the actual digging or deepening of a hole with a string of drill tools. "Reworking operations" are performed to restore the flow of oil in an existing well which has ceased to flow or has diminished in production, and the phrase covers a variety of operations including swabbing, bailing, and sand fracturing (*Morton Oil Company*, 63 I. D. 392, 396 (1956)).

oil or gas in paying quantities from the lease, (2) a detailed statement of drilling operations conducted on the lease during the period of non-production; and (3) a detailed statement of all other efforts made immediately following the cessation of production to place the well on a producing status. The Acting Director's decision gave the appellant an opportunity to show whether, after production ceased, reworking or drilling operations were conducted in accordance with the first provision of subsection (1) of the act of July 29.

In response to the Acting Director's decision, the president of Steele Oil Company, operator under the lease, submitted a statement that on March 29, 1954, a "sand-fracing" operation began which was completed on April 2, 1954, that servicing was done on May 20 and 21, 1954, and that between August 6 and August 9, 1954, re-working and servicing operations were conducted on the lease. He stated that there was some production in the course of these operations but the company's records did not show the amount or the details; that after August 9, 1954, efforts of the company were confined to negotiations with other operators who believed that the Dakota sand could be produced with further operations and who wanted to produce the well from a sand above the Dakota sand.²

An affidavit by Stanley Smalec, production superintendent on the lease during 1954, was also submitted for the appellant in response to the Acting Director's decision. Mr. Smalec's affidavit stated that the well on the leasehold produced from the Dakota sand for several years and into the year 1954 when production tapered off until the "sand-fracing" operation was done; that after "sandfracing," the well was pumped, but not very much new oil was recovered and the well would have to be shut down when dry; that several weeks after "sandfracing," he was ordered to shut down the well. Mr. Smalec stated further that in his opinion it cannot be said that the well on this lease is incapable of producing until further efforts are made to restore production including: (a) hot oil treatment, (b) casing swabbing, and (c) testing the Wall Creek sands (above the Dakota sand) in which there were oil showings when the well was drilled, but which were not tested because of the Dakota sand objective.

The material submitted by the appellant shows that there have been no operations of any kind on this lease since August 9, 1954. If the servicing operations conducted on the lease during the four days in August 1954 are regarded as the commencement of reworking operations within 60 days after cessation of production within the meaning of the first provision of subsection (1) of the act of July 29, 1954, the remaining requirement of that provision, that reworking or drilling

² Apparently oil from this lease has been produced only from the Dakota sand.

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operations thereafter be "conducted with reasonable diligence" during the period of nonproduction, was not met. By discontinuing the servicing operations which were conducted for four days in August 1954 and by not conducting any other operations after production from the lease ceased, the appellant lost the opportunity, under the first provision of subsection (1) of the act of July 29, to continue for the period of nonproduction attempts to restore production, and so to prevent termination of the lease. Accordingly, the lease was not extended by reason of the first provision of subsection (1) of the act of July 29, and the Department cannot grant the appellant's request that the lease be reinstated now, long after the expiration of the period allowed by the first provision in subsection (1) of the act of July 29, and allow another 60-day period of time for reworking and drilling operations such as those suggested in the Smalec affidavit.

The third provision in subsection (1) of the act of July 29, that a lease covering lands on which there is a well capable of producing oil or gas in paying quantities shall not expire because the lessee fails to produce it unless the lessee is allowed not less than sixty days after notice within which to place such a well on a producing status, is applicable only to leases on which there is a well capable of producing oil or gas in paying quantities, and unless there is such a well, a notice under the third provision of subsection (1) allowing a lessee not less than sixty days within which to place his well on a producing status would not be proper. The regulation (43 CFR 192.121 (b)) issued pursuant to this provision of the act of July 29, provides:

(b) No lease for lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same, unless the lessee fails to place the well on a producing status within 60 days after receipt of notice by registered mail from the Regional Oil and Gas Supervisor to do so: *Provided*, That after such status is established production shall continue on the leased premises unless and until suspension of production is allowed by the Secretary of the Interior under the provisions of the act.

The language of the statute and of the pertinent regulation plainly refers only to leases on which there is a well capable of producing oil or gas in paying quantities, and the legislative history of the provision likewise indicates that it was intended to encompass only leases with wells capable of producing oil or gas.³

³ Reports by the Senate Committee on Interior and Insular Affairs and by this Department on S. 2380 (83d Cong., 2d sess. (1954)) which became the act of July 29, 1954, explain that the third provision of subsection (1) was intended to cover situations where a well capable of producing oil or gas is shut off for various reasons, such as lack of pipelines, roads, or markets for oil or gas, in which event the provision would continue the lease for at least 60 days after notice to a lessee that he must place his well on a producing status (S. Rept. 1609, 83d Cong., 2d sess. (1954), pp. 3, 6). In the instant case, the well was shut down because production failed.

Although the Geological Survey determined that there has been no well on the appellant's lease capable of producing oil or gas in paying quantities since July 31, 1954, the appellant nonetheless apparently believes that under the act of July 29, it is entitled to a period of 60 days after notice to show that the well on the lease is capable of producing. The appellant contends that further operations on the lease are necessary before a determination that the well is not capable of producing should be made, and that without further operations such a determination is arbitrary.

The third provision of subsection (1) of the act of July 29 does not provide or contemplate that after production has ceased a lessee will be allowed 60 days in which to ascertain whether he has a well capable of production. The third provision covers only a situation where, at the time when production ceases, there is on the lease a well capable of production. The *Sinalec* affidavit makes it quite plain that on July 31, 1954, the well on the appellant's lease was incapable of production and that the operations suggested by him would be for the purpose of determining whether the well could be produced again, not for the purpose of resuming production from a well which is known to be capable of production.

In connection with the appellant's assertion that a determination of whether its well is capable of producing should not be made until after the testing of the Wall Creek sand above the Dakota sand, a report by the Geological Survey states that a well drilled through a potentially productive sand, but not tested or placed on production in such a sand, is not regarded as a well capable of producing oil or gas in paying quantities within the meaning of the act of July 29. Neither the possibility that oil or gas might be produced from the well on this lease from a sand which has not been tested or produced nor the desirability of conducting further operations on this lease provide a basis for a determination under the third provision of subsection (1) of the act of July 29 that the well is, in fact, capable of producing oil in paying quantities. In the absence of such a determination, the third provision of subsection (1) is inapplicable, and the appellant's belief that it is entitled to a period of 60 days after notice under this provision to show whether the well on this leasehold is capable of production is not correct.

Since reworking or drilling operations required by the first provision of subsection (1) of the act of July 29 were not conducted on the leasehold for the period of nonproduction, since there has been no order or consent of the Secretary suspending operations or production on the lease, and since the lease does not contain a well capable of producing oil or gas in paying quantities, the appellant's lease

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was not continued under any of the provisions of subsection (1) of the act of July 29. Accordingly, the decision holding that the appellant's lease terminated by operation of law on July 31, 1954, was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

UNITED STATES v. ALONZO A. ADAMS ET AL.

A-27364

Decided June 3, 1957

Administrative Procedure Act: Hearings Examiners—Rules of Practice: Hearings

Where a contestee does not object to the fact that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act until the case is on appeal to the Secretary, the objection is not timely and does not require that the proceedings be set aside.

Administrative Procedure Act: Hearings Examiners—Rules of Practice: Appeals: Generally

Assuming that an objection to a hearing officer (that he was not appointed in accordance with the Administrative Procedure Act) would be timely if made for the first time on an appeal to the Director of the Bureau of Land Management, failure to raise the objection at that time will constitute a waiver of the objection.

Rules of Practice: Hearings—Rules of Practice: Supervisory Authority of Secretary

Where a timely objection was not raised by a contestee at a hearing that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act and there is no showing of actual prejudice to the contestee, there is no warrant for the Secretary to exercise his discretionary power to set aside the prior proceedings and to order a new hearing.

Rules of Practice: Generally—Constitutional Law

It is not a deprivation of "due process" for an officer other than the one who hears the evidence in a mining contest to decide the case.

**MOTION TO VACATE PRIOR DECISIONS AND REMAND CASES
FOR REHEARING**

Alonzo A. Adams and Lula Harris filed three mineral applications covering in all eight placer mining claims in Charlie Canyon, which is near Castaic, California, some 40 miles from Los Angeles. The lands

are in a national forest. Contests were initiated by the United States against each of the claims upon charges made by the United States Forest Service, Department of Agriculture.

A consolidated hearing was held on the contests on January 27 and 28, 1954, before the acting manager of the Los Angeles land office as the hearing officer. In a decision dated October 13, 1954, the manager of the Los Angeles land office recommended that the applications for patent be denied and the mineral entries canceled. Upon appeal by the contestees, the Acting Director of the Bureau of Land Management, in a decision dated April 2, 1956, affirmed the rejection of the applications for patent and modified the manager's decision to declare the claims null and void. Thereupon on May 4, 1956, the contestees took this appeal to the Secretary and on June 13, 1956, after having been given an extension of time, they filed their brief in support of their appeal. On November 26, 1956, the contestees filed a motion for oral argument. After several postponements the oral argument was set for March 15, 1957, before the Deputy Solicitor at Washington, D. C. However, on March 4, 1957, the contestees filed a motion to continue the hearing pending a ruling on another of contestees' motions filed that day to vacate the prior decisions and remand the cases for rehearing. Thereupon, by a letter dated March 11, 1957, the Deputy Solicitor postponed the oral argument indefinitely.

The contestees base their motion to set aside the prior decisions and remand the contests for rehearing on the proposition that the proceedings did not comply with the pertinent provisions of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*).

In a recent decision, the Department held that contests involving the validity of mining claims must be conducted in accordance with the provisions of the Administrative Procedure Act. *United States v. Keith V. O'Leary et al.*, 63 I. D. 341 (1956). However, in that case, before any testimony was taken at the hearing held on May 12, 1953, O'Leary filed a motion to dismiss on a number of grounds, one of which was that the Department was required to proceed in accordance with the provisions of the Administrative Procedure Act. The manager denied the motion and continued with the hearing. O'Leary, however, persisted in his objection before both the Director of the Bureau of Land Management and the Secretary.

In this matter the contestees first raised an objection to the manner in which the hearing was conducted in their motion filed March 4, 1957, more than 3 years after the hearing, more than 2 years after the manager's decision, and almost a year after the Acting Director's decision.

The issue, thus, is whether the Department must, as a matter of right, grant a contestee a rehearing on a mineral contest on the ground

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that the hearing was not held in accordance with the Administrative Procedure Act where the contestee raises the issue for the first time in his appeal to the Secretary.

In *United States et al. v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952), the court held that although an Interstate Commerce Commission examiner had not been appointed in accordance with the provisions of the Administrative Procedure Act, as he should have been (*Riss & Co. v. United States*, 341 U. S. 907 (1951)), "the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." (P. 38.)

Following this holding other courts have also held that failure to comply with the Administrative Procedure Act does not invalidate the proceedings or actions of the agency if there has not been a timely objection.¹

In view of these holdings, it is clear that the fact that the provisions of the Administrative Procedure Act were not followed does not of itself invalidate the prior proceedings in these contests. The question resolves itself into a determination of whether the contestees' objection has been timely made.

None of the cases cited above involve an objection made before the administrative process was completed. Nevertheless, in the *Tucker* case, the majority opinion states:

In *Riss & Co. v. United States*, 341 U. S. 907, this Court held that officers hearing applications for certificates of convenience and necessity under § 207 (a) of the Interstate Commerce Act are subject to the provisions of the Administrative Procedure Act. * * * But timeliness of the objection was not before us, because in that case the examiner's appointment had been twice challenged in the administrative proceedings, once, *as it should have been, before the examiner at the hearings* and again before the Commission on a petition for rehearing. That decision established only that a litigant in such a case as this who does make such demand *at the time of hearing* is entitled to an examiner chosen as the Act prescribes. [P. 36; italics added.]

* * * * *

The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection *made during the hearings*. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity. [P. 38; italics added.]

¹ *Democrat Printing Co. v. Federal Communications Commission*, 202 F. 2d 298 (App. D. C., 1952) objection first made in judicial review; *Pomprowitz et al. v. United States*, 119 F. Supp. 824 (D. C., Wisc., 1954; *aff'd per curiam* 348 U. S. 803) objection made to agency 7 months after record closed.

It is also to be noted that in footnote 7 on page 37 the court points out that the Interstate Commerce Commission is granting rehearings only in cases where the applicant made an objection before the examiner. The court gave no hint that it thought the Commission was unduly restrictive in refusing rehearings in cases where the objection was not made before the examiner.

This practice of the Interstate Commerce Commission was again referred to in *Monumental Motor Tours, Inc. v. United States et al.*, 110 F. Supp. 929 (D. C. Md., 1953), which held that an objection to the qualification of the hearing examiner first made on a second petition for reconsideration is too late. The Commission itself had denied the petition for rehearing on the ground that the objection was not made before the close of the hearing. In upholding the Commission's action the court quoted from the *Tucker* case most of the language quoted above, emphasizing the same words as have been emphasized in the quotations. This leaves little room for doubt that the court read the *Tucker* decision as requiring that an objection, to be timely, must be raised at the hearing.

The court also quoted from the *Tucker* case the following:

* * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate *under its practice*. [P. 37; italics added.]

As has been stated above, the contestees did not object to the qualification of the hearing officer either during the hearing or on appeal to the Director. The Department's rules of practice in effect when the contestees appealed to the Director provided:

* * * All grounds of error not assigned or noticed and argued in the brief will be considered as waived. 43 CFR 221.50.

Even assuming that an objection first raised on appeal to the Director would have been timely, the contestees must be deemed to have waived this ground of error by not having raised it at that time.

The contestees further seek to distinguish this appeal from the *Tucker* case on the ground that there is an inherent unfairness in this case because the Department instituted the proceedings and is a party to it and the manager was in part responsible for "assembling" the case against the contestees.

The short answer to this point is that in this case the charges against the mining claims were instigated by the Forest Service of the Department of Agriculture, whose officers investigated the claim and conducted the prosecution. 43 CFR 205.2, 205.7, 205.9.

However, I do not believe a distinction is valid even in the case of a contest brought and conducted by the Department of the Interior.

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The contestees made no suggestion that the hearing officer or the manager exhibited bias, favoritism, or unfairness. The contest was conducted in accordance with procedures which have been in effect for many years and under which thousands of mining claims have been adjudicated. Although there was not as complete a separation of functions as the Administrative Procedure Act requires, I cannot find that the procedure was so inherently unfair as to invalidate the hearing without a specific showing of prejudice to the contestees. See *Tucker* case, *supra*, p. 35, and *Monumental* case, *supra*, p. 933.

The contestees also allege that they were deprived of the opportunity to take advantage of certain procedural steps provided by the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1007 (b)). However, if failure to comply with the provisions of the Administrative Procedure Act relating to the appointment and qualification of the hearing examiner does not invalidate the proceedings, failure to adhere to technical procedural requirements cannot have that effect.

The contestees also charge that "due process" requires that the officer who hears the evidence must make the decision. This issue has long since been settled adversely to the contestees. *Morgan v. United States*, 298 U. S. 468 (1936); *Monolith Portland Cement Co. et al.*, 61 I. D. 43, 46 (1952).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the motion to vacate the prior decisions of the manager and the Acting Director and to remand the cases for rehearing is denied.

EDMUND T. FRITZ,
Deputy Solicitor.

NELSON A. GERTTULA

A-27325

Decided June 20, 1957

Public Lands: Disposals of

Public land which has been withdrawn by Executive Order No. 6964 may not be disposed of until it has been classified, pursuant to section 7 of the Taylor Grazing Act, as amended, as suitable for such disposition.

Taylor Grazing Act: Generally

The right to select unappropriated public land in lieu of land relinquished under the acts of July 1, 1898, and May 17, 1906, cannot be satisfied unless the land selected, if withdrawn, is determined, pursuant to the provisions of section 7 of the Taylor Grazing Act, as amended, to be proper for the satisfaction of the lieu right.

Taylor Grazing Act: Generally

Section 1 of the Taylor Grazing Act, as amended, does not authorize the holder of a lieu selection right to select withdrawn land in satisfaction of his right.

Public Lands: Classification—Taylor Grazing Act: Classification

In exercising the discretionary authority vested in him by section 7 of the Taylor Grazing Act, as amended, the Secretary may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal, including the effect on the public interest.

Public Lands: Classification—Taylor Grazing Act: Classification

As a general rule, the first application filed for the classification of land under section 7 of the Taylor Grazing Act, as amended, is entitled to prior consideration over subsequent applications for the same land.

Public Lands: Classification—Taylor Grazing Act: Classification

The fact that land may be suitable for disposition under the first application filed therefor does not require the land to be classified for such disposition if the land is more suitable for other disposition.

Public Lands: Classification—Taylor Grazing Act: Classification—State Selections

State selections are to be preferred over conflicting private applications for the same land, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On October 20, 1953, Nelson A. Gerttula, as attorney in fact for Frank L. Huston, filed an application for the classification, under section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315f), of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 5, T. 3 N., R. 8 E., W. M., Washington, as proper for acquisition in satisfaction of an outstanding lieu right, acquired pursuant to the acts of July 1, 1898 (30 Stat. 597, 620), and May 17, 1906 (34 Stat. 197),¹ and for the opening of that land to selection. On June 23, 1955, the manager of the Spokane land office rejected the application, whereupon Mr. Gerttula appealed to the Director of the Bureau of Land Management. On January 4, 1956, the Director affirmed the action of the manager on the ground that the land selected by Mr. Gerttula is not of the character which should be classified for disposal in satisfaction of an individual lieu selection right. Mr. Gerttula has now appealed to the Secretary of the Interior.

Mr. Gerttula contends that the right which Huston acquired when he relinquished land on which he had a completed claim is a contractual right to select land; that that right is protected by section 1 of the

¹ These are acts under which certain entrymen and settlers on land within the limits of the land grant to the Northern Pacific Railroad Company were permitted to transfer their claims to an equal quantity of public lands "not mineral or reserved, and not valuable for stone, iron, or coal * * *."

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Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315) and may not properly be diminished, restricted or impaired by classification of the land applied for as not-suitable for disposition in satisfaction of that right; that the Director erred in holding that the selection right under the act of July 1, 1898, carries no right to a particular tract; that the Director erred in so construing section 7 of the Taylor Grazing Act as to impair an existing right; and finally, that while the Director stated that the Gerttula application was considered on its merits and without reference to the possible suitability of the tract for selection by the State of Washington under a later application (Washington 01515), the fact that the State had filed such an application was taken into consideration in denying his application.

All but the last of these contentions made by Mr. Gerttula in his present appeal have already been considered by the Department in connection with efforts which Mr. Gerttula has made, since the enactment of the Taylor Grazing Act, to select land in satisfaction of lieu rights acquired pursuant to the acts of July 1, 1898, and May 17, 1906.

In 1941, the Department rendered two decisions affirming the action of the Commissioner of the General Land Office, predecessor of the Director of the Bureau of Land Management, in rejecting selections made by Mr. Gerttula in satisfaction of outstanding lieu rights.² In both of those decisions, the Department recognized that the applicant had a valid outstanding right to select 40 acres of public land.³ It held, however, that the selection right carries with it no right to a particular tract, that the refusal to approve a particular selection is neither to repudiate nor to destroy the selection right, and that the right continues to exist unimpaired and will be permitted to be satisfied when exercise with reference to lands which meet statutory conditions and which, if reserved, may be restored to selection without injury to paramount public interest.

The Department's position with respect to the satisfaction of the right here attempted to be exercised⁴ may be summarized as follows: The right is to acquire unreserved, nonmineral public land equal in amount to the land relinquished. There is no right to any specific tract of land. All of the vacant, unreserved and unappropriated public lands in the State of Washington were withdrawn from settlement,

² *Nelson A. Gerttula, substitute attorney-in-fact for W. G. Howell, attorney-in-fact for Frank L. Huston*, A-22716 (July 12, 1941), and A-23158 (December 31, 1941).

³ In the second decision, the right involved was the same as that attempted to be exercised here.

⁴ The right which Mr. Gerttula is attempting to exercise is based upon a claim which had been perfected. Therefore, there is no question in this case as to the character of the land which may be selected as there may be in those cases where a party attempts to exercise a lieu selection right based upon an uncompleted settlement claim or upon a homestead entry under which the party had not completed his required residence or improvements.

location, sale or entry and reserved for classification pending determination of the most useful purpose to which the lands might be put and for conservation and development of natural resources by Executive Order No. 6964 of February 5, 1935. However, the Secretary of the Interior is, by section 7 of the Taylor Grazing Act, as amended, authorized, in his discretion, to examine and classify any of the withdrawn lands which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for by that act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws. The right to select unappropriated public land which, in this instance, had been outstanding and unexercised for approximately a quarter of a century prior to the withdrawal mentioned above and prior to the passage of the Taylor Grazing Act, has not been diminished in any way because the Congress saw fit, by the Taylor Grazing Act, to make a favorable classification of land a condition precedent to opening such land for selection. Nothing in section 1 of the Taylor Grazing Act, which section provides that nothing in the act shall be construed to diminish, restrict, or impair any right which had been initiated under existing law, except as otherwise expressly provided in that act, compels a contrary conclusion. Section 1 of the act protects valid rights but since the right to select under the lieu selection statutes involved is a general right to select unappropriated land and since the land selected by Mr. Gerttula is not unappropriated, the right cannot be satisfied until land is selected which, in the opinion of the Secretary of the Interior, is proper for acquisition in satisfaction of the right.

In exercising the discretionary authority vested in him, the Secretary, or his delegate, may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal, including, but not limited to, the purpose to which it will be put in conformance with those particular public land laws which contain use requirements. The Secretary may also properly consider the effect on the public interest, particularly in connection with those applications under laws where there is no requirement as to the physical characteristics of the land applied for, or the use to which it may be put. And while, as a general rule, the first application filed for a tract of land will have prior consideration over subsequent applications for the same land, such priority of consideration is not absolute but discretionary.

June 20, 1957

Nor does the fact that a tract of land, embraced in a first application, contains resources which would permit the applicant to meet the minimum requirements imposed by the law under which the application is filed require that the land be classified for disposal under that particular application if the land is more suitable for use or disposals prescribed or contemplated by other applicable statutes.

Nor is it incumbent on the Secretary, or his delegate, to classify land for disposal under any particular law, even though it meets the minimum requirements of that law, if the land is found to be more suitable for the uses prescribed or contemplated by other applicable laws, or if the public interest would be better served by disposal under other applicable laws. However, the classification will be made pursuant to the first application, properly filed, unless the facts and circumstances support another classification as being more in the public interest.

Applications made by the States in exercise of their lieu selection rights should, as a matter of principle, be honored over competing private applications for the same lands, even though the latter may more nearly fit the characteristics of the lands. However, in order to merit preference consideration, the State should be diligent in exercising its selection rights and should make application within a reasonable time after the filing of any competing application. Otherwise prior competing applications will normally be granted the equitable consideration to which they are entitled. Therefore, the equities of a prior competing application constitute an element which should be considered in determining what constitutes a reasonable time.

The record shows that the State's application was filed some eleven months after the filing of the Gerttula application. In the circumstances involved in this particular case, it does not appear that the State was sufficiently diligent in the attempted exercise of its right, following the filing of the Gerttula application, to merit preferential consideration of its application over that of Mr. Gerttula.

However, I find nothing in the record to indicate that Mr. Gerttula's application was not considered on its merits or that the fact that the State had filed a subsequent application for the same land influenced the decision of the Director.

The land in question is a 40-acre tract of mountainous, timbered land lying adjacent to the Gifford Pinchot National Forest. It is not suitable for cultivation. Since there are both Federal and State timber management programs for the immediate area, which programs include the blocking up of timber lands and the institution of sustained yield practices, it is in the public interest to retain the tract in public ownership.

In the circumstances, it was proper to refuse to classify the land as suitable for acquisition in satisfaction of the individual outstanding lieu right. The rejection of Mr. Gerttula's application is, accordingly, affirmed.

ROGER ERNST,
Assistant Secretary.

W. H. BURNETT ET AL.

A-27453

Decided June 24, 1957

Oil and Gas Leases: Applications

Where an oil and gas lease application is filed jointly by two persons, one signing on his own behalf and as attorney-in-fact for the other, and the application is not, as to the asserted principal only, in compliance with the regulations and instructions in a matter that requires it to be rejected and returned without affording the applicants priority, it will not be considered as the sole application of the other applicant, but will be rejected in its entirety and will not earn any of the applicants any priority.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

W. H. Burnett and William Weinberg have appealed to the Secretary of the Interior from a decision dated December 20, 1956,¹ of the Director of the Bureau of Land Management which affirmed the rejection by the manager of the Santa Fe land office of their non-competitive offer to lease for oil and gas certain land in Oklahoma.

The appellants' offer, New Mexico 016485, as filed on October 7, 1954, was signed by Burnett first for himself and then for Weinberg by Burnett as attorney-in-fact, each asking for a one-half interest in the lease. The offer was defective because it was not accompanied by a statement over Weinberg's signature as to his holdings in Oklahoma or by statements by him and Burnett as to whether there was any agreement or understanding between them or any other person, either verbal or written, by which the attorney-in-fact or such person had received or was to receive an interest in the lease when issued, as required by the pertinent regulation, 43 CFR 192.42 (e) (3) and (4).

On December 20, 1954, Merwin E. Liss filed a noncompetitive offer New Mexico 017083 which includes, among other land, the land covered by New Mexico 016485. On March 31, 1955, after the manager's decision, the appellants, along with their appeal to the Director, refiled their offer, accompanied by the statements required by 43 CFR 192.42 (e) (3) and (4).

¹ The Director's decision was corrected on a minor matter not material here by a decision dated January 4, 1957.

June 24, 1957

In their present appeal the appellants admit that their application was defective as to Weinberg, but contend that because the application as to Burnett was in all respects regular, the application should have been accepted and acted upon as though Burnett were the sole offeror.

Basically this argument resolves itself into the proposition that where two or more persons have made a joint offer, a lease should be issued to one or more of them who would have been entitled to a lease if he or they had applied in his or their own right, regardless of the fact that others of the applicants have not complied with the pertinent regulations. In other words, it contends that a joint offer should be considered as a series of individual offers and that a lease should be issued to any of the offerors who have qualified for a lease.

However, the offerors have not acted as separate individuals. For reasons of their own they chose to act as a unit, as a single entity. See *Edward Lee et al.*, 51 L. D. 299 (1925). They filed one offer and paid one filing fee and one year's advance rental, and the offer was assigned one number. Consequently, their offer ought to be judged by the same standards that are applied to any other offer.

An offer signed by an attorney-in-fact or agent that does not comply with the regulations relating to such filings earns the offeror no priority until it is brought into compliance with the regulation. *W. M. Vaughey, George W. May*, A-27389 (October 31, 1956). The mandatory lease offer form which the offerors filed stated in paragraph 9 of "General Instructions":

The offer will be rejected and returned to the offeror and will afford the applicant no priority if: * * * (d) The offer is signed by an agent in behalf of the offeror and the offer is not accompanied by a statement over the offeror's own signature with respect to holdings and citizenship and by the statements and evidence required by 43 CFR 192.42 (e) (4). * * *

This warning was repeated in the regulation current when New Mexico 016485 was filed. 43 CFR, 1953 Supp., 192.42 (g), as amended by Circular 1875, 19 F. R. 4191.

Accordingly, the manager's decision rejecting and returning Burnett and Weinberg's offer was proper because at that time it was not in compliance with the regulation.

Thereafter, the appellants refiled their application. However, before they did, Liss filed his application, and, as the Director held, as a prior application, it must be considered before action is taken on the appellants' refiled application.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised;

17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

E. L. CORD, dba EL JIGGS RANCH

A-27426

Decided June 25, 1957

Grazing Permits and Licenses: Adjudication—Administrative Procedure Act: Hearings

Although a range manager's decision on an application for grazing privileges may satisfy the requirements for a notice of hearing under the Administrative Procedure Act, such a decision does not constitute a notice of hearing under the Administrative Procedure Act and a hearing which is held on the applicant's appeal from the range manager's decision is not in violation of the Administrative Procedure Act because the decision does not conform to the requirements for a notice of hearing imposed by the Administrative Procedure Act.

Grazing Permits and Licenses: Hearings

Where the record shows that a grazing applicant knew prior to the time of the hearing on his appeal the precise issues involved in the hearing, he cannot later claim that he was not given proper notice of the issues involved in the hearing.

Grazing Permits and Licenses: Hearings

In view of section 18 of the Taylor Grazing Act, which provides that local advisory boards shall give advice and recommendations on grazing applications, it seems certain that range managers may base their decisions largely or entirely upon hearsay or other evidence which would not be competent or admissible in court proceedings.

Grazing Permits and Licenses: Hearings

Since the burden is upon an applicant for grazing privileges who appeals from the rejection of his application to show by substantial probative evidence that the rejection was improper, it is unnecessary to examine the Bureau's evidence on the issues involved if the appellant's evidence does not sustain his burden.

Grazing Permits and Licenses: Hearings—Public Records

The official grazing files are public records of which the Department takes notice in rendering decisions but the probative value of the files depends upon the contents of the files.

Grazing Permits and Licenses: Appeals

Where a grazing applicant appeals to a hearing examiner from a decision of the range manager partially rejecting his application, the burden is upon the applicant to show by substantial evidence that the adjudication was improper.

*June 25, 1957***Administrative Procedure Act: Hearings—Grazing Permits and Licenses: Hearings**

In an administrative proceeding the strict common law rules of evidence do not apply and the fact that hearsay evidence is admitted will afford no basis for ordering a new hearing.

Administrative Procedure Act: Hearings—Grazing Permits and Licenses: Hearings

Although it has been held that under section 7 (c) of the Administrative Procedure Act, an administrative finding cannot be based upon hearsay alone or hearsay corroborated only by a scintilla of evidence, it is questionable whether this principle applies to hearings in grazing cases in view of the fact that the hearings are held only on appeals and the appellant has the burden of proof.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

E. L. Cord, doing business as the El Jiggs Ranch, has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated October 10, 1956 which affirmed the hearing examiner's decision of June 16, 1953, which in turn had affirmed the range manager's decision of January 31, 1952, partially rejecting Cord's application for grazing privileges within the Jiggs Unit of Nevada Grazing District No. 1 for the 1952 grazing season.

Nevada Grazing District No. 1 was established in 1935 and thereafter divided into range units. However, there was no actual adjudication of grazing privileges at that time. In lieu of adjudication of grazing privileges, grazing licenses were issued to qualified applicants for the numbers of livestock they claimed to have operated on the range from their base properties during the priority period from 1929 to 1934. These licenses appear to have been issued on the premise that the entire range area was public land under the administrative jurisdiction of the Bureau, no consideration being given to the fact that a material part of the unfenced open range was privately owned.

The priority numbers recognized under this policy in many cases did not therefore represent the true priority attaching to the base properties as defined by the Federal Range Code in view of the fact that only part of the range, 50 percent in the checkerboard area,¹ where the livestock were grazed during the priority period, was public land on which prior use was recognized. Therefore, in order to arrive at the correct priority in each case, a reduction from the claimed priority should have been made to the extent that the range on which the priority was established was privately owned. Also, the areas to be grazed should have been restricted to those over which the Bureau

¹ Part of the Jiggs Unit consists of alternate sections of private lands intermingled with Federal lands, thus creating a so-called "checkerboard" pattern.

had supervision. The failure to make these adjustments prior to 1950 had resulted in the harmful overgrazing of the range as evidenced by depletion of the forage cover and serious acceleration of water and wind erosion.

The first step taken toward correcting this situation and making a complete adjudication of grazing privileges was initiated by the range manager through a notice issued January 11, 1949, to all licensees in the Jiggs Unit. This notice provided that (a) the qualifications or Class 1 demand for grazing privileges of each applicant would be determined, (b) reductions from former licensed numbers would be made to the extent of the unfenced private land within the area of range used by each applicant, ranging from 50 percent in the checker-board area to 13 percent in the area to the south, and (c) owners of any unfenced private land situated in their range areas would be given credit to the extent of the grazing capacity of such land.

The first step in the procedure outlined above, i. e., the adjudication of the Class 1 demand for grazing privileges, was taken by the range manager on December 30, 1949, when he sent a notice to the appellant stating that beginning with the 1951 grazing season the appellant would be allowed 9,456 AUMS on the Federal range. The notice stated that the allowance was in accordance with a study made of the Jiggs Unit and represented the appellant's qualified demand on the Federal range. The appellant protested this action. On July 5, 1950, he was notified that he would be allowed 10,171 AUMS on the Federal range. The record shows that the appellant had been licensed in the years 1943-1950 from a low of 13,378 AUMS in 1943 to a high of 17,422 AUMS in 1948. The proposed allowance of 10,171 AUMS therefore represented a substantial reduction.

Mr. Cord appealed to the hearing examiner from the notice of July 5, 1950, and a hearing was set for May 23, 1951. At the hearing, however, counsel for Mr. Cord requested the privilege to withdraw his appeal, which was granted by the hearing examiner. The withdrawal apparently was based on the ground that the Federal Range Code does not provide for appeals from notices of adjudications.

Subsequently, El Jiggs Ranch filed a short form application dated November 10, 1951, with the range manager for the following grazing privileges during the 1952 grazing season in the Jiggs Unit:

3000 Cattle	4/1/52 to 9/30/52
1000 Cattle	10/1/52 to 11/15/52
100 Cattle	11/16/52 to 12/15/52
50 Horses	4/16/52 to 12/30/52

The application was submitted to the advisory board on December 5, 1951, and the following recommendation of the board was set forth in

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a notice dated December 17, 1951, from the range manager to El Jiggs Ranch:

That your application be approved for the total qualifications of your base properties in accordance with our I-233 Notice to you of July 5, 1950, which allowed 10,171 AUMs of Federal Range use and 866 AUMs of private unfenced land use, or 92% Federal Range use. Based on your application, the following is approved:

APPROVE:

1625 Cattle 4/1/52 to 9/30/52—92%-----	8970 AUMs
520 Cattle 10/1/52 to 11/15/52—92%-----	718 AUMs
100 Cattle 11/16/52 to 12/15/52—92%-----	92 AUMs
50 Horses 4/16/52 to 12/30/52—92%-----	391 AUMs
Total-----	10,171 AUMs

REJECT:

1375 Cattle 4/1/52 to 9/30/52
480 Cattle 10/1/52 to 11/15/52 for the reason this is in excess of your Class I Federal Range demand and for the further reason there is insufficient range available for Class II livestock.

This recommendation is made in accordance with Section 2 (g) of the Federal Range Code approved August 31, 1949.

The notice also provided that if the applicant wished to protest the recommendation, he should appear in person, by attorney or representative, or signify his protest in writing.

A written protest was filed from this notice which was considered by the advisory board and the range manager on January 22, 1952. On January 31, 1952, the following recommendation made by the board and approved by the range manager was included in a notice of that date which was sent to El Jiggs Ranch:

That the former recommendation as set forth on I-404 Notice, Dated December 17, 1951 be sustained as it applies to the 10,171 AUMs of Federal Range use and 866 AUMs of private unfenced land use or 92% Federal Range use.

It was also recommended that the times and numbers to be approved be amended to more nearly fit your actual operation of the livestock.

APPROVE:

800 Cattle 4/1/52 to 4/15/52—92%-----	368 AUMs
1200 Cattle 4/16/52 to 4/30/52—92%-----	552 AUMs
1800 Cattle 5/1/52 to 9/30/52—92%-----	8280 AUMs
800 Cattle 10/1/52 to 10/31/52—92%-----	736 AUMs
40 Horses 4/16/52 to 10/31/52—92%-----	240 AUMs
Total-----	10,176 AUMs

REJECT:

2300 Cattle 4/1/52 to 4/15/52
1800 Cattle 4/16/52 to 4/30/52
1200 Cattle 5/1/52 to 9/30/52

200 Cattle 10/1/52 to 10/31/52

1000 Cattle 11/1/52 to 11/15/52

10 Horses 4/16/52 to 10/31/52

50 Horses 11/1/52 to 12/30/52—for the reason that this is in excess of your Class I Federal Range demand and for the further reason there is insufficient range available for Class II livestock.

This recommendation is made in accordance with Section 2 (g) of the Federal Range Code approved Aug. 31, 1949.

Note: A typographical error was made in our notice to you of December 17, 1951 which allowed 866 AUMs of private unfenced land use—This should have been 886 AUMs and is corrected in this notice.

On February 11, 1952 an appeal was taken from the range manager's notice. In support of the appeal the applicant alleged:

That the Federal Range demand of the so-called Home Ranch, Homestead and Hale Fields is not subject to the reduction as has been applied in the recommendation herein appealed from, and that an excess of more than 20% of said demand was established south of, and outside of, the so-called railroad checkerboard area.

That appellant, through his predecessors in interest, has established priorities and commensurate base property to entitle him to greater use of the public domain than has been recommended.

That appellant will be irreparably damaged by the enforcement of the limited use of the public domain under the recommendation of the said Advisory Board.

On December 16, 1952, a hearing was held on the appeal at Elko, Nevada. The appellant was represented by his attorney and the Bureau of Land Management was represented by the Assistant Chief, Division of Range Management, Region II, Reno, Nevada. Mr. H. V. Hansel and 6 other licensees in the Jiggs Unit appeared as intervenors.

At the opening of the hearing the attorney for the appellant stated that the appellant's appeal would be directed to "errors and actions which he considers arbitrary and discriminatory and without due process in connection with land reference No. 1, land reference No. 2 and land reference No. 5 of the 'History of the El Jiggs Ranch Case Pending Appeal.'" The document referred to was explained to be (Tr. 3) a résumé of the actions taken in the case which was prepared in 1951, and which was made a part of the record of the case. The appellant also stated that the issues in the case were the priorities of land references 1, 2, and 5, and the place of use during the priority period with respect to land reference 2 (Tr. 4).²

In the course of the hearing, testimony was given by the range manager regarding the priority established from the three base proper-

² The land references referred to by number appear to refer to various divisions of the El Jiggs Ranch now owned by E. L. Cord. Land reference 1 refers to the so-called Bullion ranch, 160 acres in sec. 26, T. 31 N., R. 53 E. Land reference 2 refers to the Home ranch, or Hale Fields and Homestead combined, located in Twps. 29 and 30 N., Rs. 55 and 56 E. Land reference 5 refers to the Odiaga ranch in Twps. 28 and 29 N., R. 55 E.

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ties, the basis for the determination by the Bureau of Land Management of the priorities established, and the place of use in connection with the Home ranch or land reference 2. Counsel for the appellant cross-examined the range manager at some length regarding the issues stipulated.

The appellant offered in evidence the testimony of Mr. J. L. Hylton, who, during the priority period, owned a one-half interest in the Bullion ranch and the entire interest in the Home ranch. These two properties along with others comprised the Hylton ranch properties and now constitute a part of the El Jiggs ranch. Mr. Hylton's testimony was based on his memory of the operations of the Hylton properties during the priority period 1929 to 1934. Other than Mr. Hylton's testimony, the appellant did not offer in evidence any documents or records.

On June 16, 1953, the hearing examiner issued his decision, which held that the appellant had failed to establish any grounds of reversible error in the range manager's decision, and affirmed the decision appealed from.

The appellant thereupon appealed to the Director, Bureau of Land Management, from the examiner's decision. On October 10, 1956, the Director affirmed the examiner's decision, but remanded the case for a further determination of the dependency by use established on the base properties by different classes of livestock. From this decision E. L. Cord appealed to the Secretary of the Interior.

In the appellant's appeal he does not attack any of the Director's rulings on the merits of the case. Instead, his appeal is confined wholly to a claim of procedural error, namely, that the hearing held on December 16, 1952, did not meet the requirements of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*). This contention is based on two points: (1) that the notices of the range manager's actions were inadequate to timely inform the appellant of the matters of fact and law asserted, as required by section 5 (a) of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1004 (a)) so that he was unable to properly prepare to meet the case against him, and (2) that the Bureau's entire case was based on hearsay evidence and the appellant was not given the opportunity to cross-examine the witness whose testimony was being used, as required by section 7 (c) of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1006 (c)).

Section 5 of the Administrative Procedure Act provides in pertinent part as follows:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *

(a) *Notice*—Persons entitled to notice of an agency hearing shall be timely

informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * *

The appellant contends that the notices served upon him which stated that his application was disapproved for certain numbers of cattle "for the reason that this is in excess of your Class I Federal Range demand and for further reason there is insufficient range available for Class II livestock * * *" did not meet the requirements of section 5 (a) and that appellant, therefore, "could not prepare to meet the case against him." He also contends that the Bureau of Land Management in reducing his grazing privileges must give him a reasonable opportunity to prepare his defense to the assertions made by the Bureau and present the same at a hearing.

The appellant's contention is based upon a fundamental misconception of the procedure in grazing cases. Section 3 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315 b), authorizes the Secretary of the Interior to issue grazing permits in grazing districts for terms not exceeding 10 years, subject to a preferential right of renewal. However, because the collection of data and other information is necessary to the proper issuance of grazing permits, the Department determined shortly after the passage of the Taylor Grazing Act in 1934 that temporary licenses should be issued until the necessary information could be compiled for the issuance of term permits (see 43 CFR, 1940 ed., 501.1 (c)). Such licenses are still issued (43 CFR, 1955 Supp., 161.1 (c)). The authority to issue licenses stems from the very general authority given the Secretary by section 2 of the act (43 U. S. C., 1952 ed., sec. 315a) to make provision for the protection, administration, regulation, and improvement of grazing districts, etc. *Brooks v. Dewar*, 313 U. S. 354 (1941). There is no specific reference in section 2 to the issuance of grazing licenses.

This being the case, there is, of course, no provision of the Taylor Grazing Act which expressly covers the procedure for issuing grazing licenses. More to the point, there is no provision of the act which provides for any type of hearing on an application for a grazing license or states that a license can be issued only after a hearing has been held. For that matter, even as to grazing permits, section 3 of the act makes no mention of any kind of a hearing that must be held before a permit can be issued. It follows therefore that section 5 of the Administrative Procedure Act, relied upon by the appellant, has no applicability at all where an application for a grazing license or permit ends with the adjudication of the application by the range manager.

The only provision for a hearing to be found in the Taylor Grazing Act which is applicable to the grant of grazing privileges is contained

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in section 9 (43 U. S. C., 1952 ed., sec. 315h) which provides that "The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings *on appeals* from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department" [*italics added*]. Pursuant to this requirement, the Federal Range Code has provided from the beginning for hearings *on appeals* to an examiner (43 CFR, 1940 ed., 501.19; 43 CFR, 1955 Supp., 161.10).

Because section 9 of the Taylor Grazing Act expressly provides for hearings on appeals, the Department has taken the view that such hearings are generally governed by the provisions of the Administrative Procedure Act relating to hearings. Thus hearings on grazing appeals are conducted by examiners appointed pursuant to section 11 of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1010). Nonetheless, the fact is that the hearings are held only on appeals and not in connection with the original adjudication by the range manager of an application for grazing privileges.

The actions taken on the appellant's application were in accordance with the procedure set forth in 43 CFR 161.9. This procedure is that applications for permits or licenses are first considered by the local advisory board which makes a recommendation to the range manager. To the extent that the recommendation is adverse, notice is served on the applicant informing him of the reasons and setting a time for hearing protests against the recommendation. After hearing the protest, the advisory board makes a final recommendation to the range manager, who, if he approves, serves a notice on the applicant. "Such notices will constitute the range manager's final decisions for purposes of appeal" (sec. 161.9 (b)).

As related earlier, this is the procedure that was followed on the appellant's application. It is at once apparent that the "notices" of which he complains as not being in conformity with section 5 (a) of the Administrative Procedure Act were not notices of hearings at all but were decisions on his application which would have been final if he had not first protested the initial recommendation of the advisory board and then appealed from the final decision by the range manager. As the decisions did not constitute notices of hearing, they were obviously not required to conform to section 5 (a) of the Administrative Procedure Act.

When the appellant exercised his privilege to appeal from the range manager's decision, he, and not the Bureau of Land Management, became the moving party. As an appellant he was bound by the provision of the Federal Range Code that "The appeal shall be accompanied by specifications of error setting forth in a clear and

concise manner the matters upon which it is based." 43 CFR 161.9 (c) (1). The burden became his to show in what manner the range manager's decision partially rejecting his application was in error. It was up to him and not the Bureau to shape the issues of fact or law to be considered at the hearing. Consequently, he cannot complain that he was not advised as to the issues to be considered at the hearing.

The Department's decision in the case of *M. F. Sullivan et al.*, 63 I. D. 269 (1956), is not to the contrary. There Sullivan's applications for grazing privileges were rejected to the extent that he requested privileges in the Deep Creek area. The rejection was based solely on the ground that Sullivan had not established dependency by use in the Deep Creek area during the priority period. He appealed to the hearing examiner. At the hearing the Bureau contended for the first time that regardless of priority Sullivan was properly excluded from Deep Creek as a matter of good range management. Over Sullivan's objection, the examiner permitted the issue of proper range management to be considered, along with the issue of priority. The Director held that the examiner's action was proper, citing 43 CFR 161.9 (f) (now renumbered 43 CFR, 1955 Supp., 161.10 (d)), which provides that the examiner may state issues on which he wishes evidence to be presented.

The Department, however, held that this regulation did not justify disregard of 43 CFR 161.9 (b), which provides that, if the recommendation of an advisory board following consideration of a protest by an applicant is adverse, and the range manager approves, "a notice giving the reason or reasons therefor will be served on the applicant." The regulation continues with the sentence previously quoted that such notice will constitute the range manager's final decision for purposes of appeal. The Department declared that this regulation was in accordance with section 5 (a) of the Administrative Procedure Act and could not be disregarded and that it was error not to have given proper notice to Sullivan of the issue of good range management.

It was not intended to say in the *Sullivan* decision that the notices of actions taken by the range manager, i. e., his decisions, constitute notices of hearings within the meaning of section 5 (a) of the Administrative Procedure Act. All that was intended to be said was that if the Bureau wished to raise and rely upon an issue at a hearing, it was required to give proper notice of the issue and that proper notice would be given by a statement of the issue in the range manager's decision.

However this may be,³ the appellant here knew prior to the time of

³ Admittedly there is some confusion as to the interplay of the Federal Range Code and the Administrative Procedure Act. This stems from the fact already alluded to that hearings in grazing cases are held only on appeals after a decision is made which would be final in the absence of an appeal. The Administrative Procedure Act, on the other hand, seems to be concerned with hearings to be held prior to any adjudication in a proceeding.

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the hearing precisely the respects in which his Class I demand had been found wanting. This is definitely established by the grounds stated in the appellant's appeal to the examiner and the statements made by appellant's counsel at the opening of the hearing, all of which was set forth earlier. The appellant knew the three parcels of his base property that were drawn in question and presented the testimony of Mr. J. L. Hylton to overcome the determinations which had been made by the Bureau with respect to those parcels. It comes much too late now for the appellant to contend for the first time on this appeal that he was not properly advised of the matters at issue at the hearing.

Plainly there is no merit to the appellant's claim that because of deficient notice he "could not properly prepare to meet the case against him." The appellant was not a defendant at the hearing facing an unknown charge. He was the plaintiff who was pressing charges of improper actions by the range manager and he knew precisely what the issues were. The appellant's first ground of appeal to the Secretary is therefore rejected.

The appellant's second contention rests on paragraph (c) of section 7 of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1006 (c)). That section provides:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(c) *Evidence.*—Except as statutes otherwise provide, the *proponent of a rule or order shall have the burden of proof*. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to *conduct such cross-examination as may be required for a full and true disclosure of the facts.* * * * [Italics supplied.]

The appellant's contention here seems to be that at the hearing the Bureau was the proponent of the order reducing his grazing privileges and as such, by virtue of section 7 (c), had the burden of proof, and that the Bureau recognized this burden at the hearing by presenting its case initially. He then asserts that the Bureau presented nothing but hearsay evidence to sustain its burden and that as a result he was deprived of his right of cross-examination in violation of section 7 (c) of the Administrative Procedure Act. He also asserts that his deprivation of the right of cross-examination is a denial of due process of law guaranteed him by the Constitution of the United States.

As we have already seen, the appellant is in error as to who had the burden of proof at the hearing. In *M. F. Sullivan et al., supra*, the Department held that although the burden at the hearing was on the Bureau to show that the exclusion of Sullivan from Deep Creek was required by good range management, the burden was on Sullivan to show that he had established dependency by use in Deep Creek during the priority period. The Department said that if the range manager had rejected Sullivan's applications on the ground of proper range management, the burden as to that issue would also have been on Sullivan. See also *Ira Hatch, Delbert Redd et al.*, A-26483 (November 17, 1952). It is plain therefore that the appellant had the burden of proving at the hearing that he was entitled to more grazing privileges than were awarded to him by the range manager.

The appellant has sought to make it appear as though he possessed grazing rights of which he is being deprived by the Bureau. He is seeking thereby to fasten the burden of proof on the Bureau. If the appellant had been the holder of a term permit which the range manager had sought to reduce by his decision of January 31, 1952, the burden indeed would have been on the Bureau at the hearing to justify the reduction. See *Frank Halls, A. J. Redd*, 62 I. D. 344, 350 (1955). But the appellant did not have a term permit. He had merely been given annual licenses which, we have seen earlier, were interim grants of privileges pending the assembling of sufficient data to enable precise adjudications of base properties which would be essential to the issuance of term permits. Thus the range manager's decision did not deprive the appellant of grazing privileges which he had previously been granted for the 1952 grazing season.

With this in mind we turn to the appellant's major contention based on section 7 (c) of the Administrative Procedure Act that "The government's entire case was based on hearsay evidence" and that he had no opportunity to cross-examine the witnesses whose testimony was being used. Specifically, the appellant asserts that the only witness called by the Bureau was Delbert Fallon, the range manager, and that he admittedly had no personal knowledge of the basis for the Bureau's determination of appellant's grazing privileges. The appellant further asserts that the Bureau's case consisted primarily of surveys made by Wayne [Waine] Larson and a map purportedly submitted by D. D. Ogilvie which was never properly identified and proved. The appellant contends that he had no opportunity to cross-examine Messrs. Larson and Ogilvie since they were not present and that it was valueless to cross-examine Mr. Fallon because he had no personal knowledge of the basis for the Bureau's action.

Mr. Fallon was the range manager who signed the notices or deci-

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sions of December 17, 1951, and January 31, 1952, to the El Jiggs ranch rejecting in part its application for grazing privileges. It was his final decision of January 31, 1952, which the appellant appealed to the hearing examiner. Obviously Mr. Fallon was in a position to state, and did state, upon what basis his decision was rendered, and he was available for cross-examination on that point.

What the appellant is contending, however, is that Mr. Fallon based his decision on certain information in the case files of which he had no personal knowledge and that therefore he could not be cross-examined as to the accuracy of the information. The appellant is referring to the fact that Mr. Fallon used surveys made by Wayne Larson for the purpose of determining the appellant's qualifications and that Mr. Fallon did not know of his own knowledge whether the facts included in the Larson surveys were true.

The rule has long been settled that the technical rules for the exclusion of evidence are not applicable to Federal administrative proceedings in the absence of a statutory requirement that such rules are to be observed. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 155 (1941). The Administrative Procedure Act has made no change in this principle; thus the mere receipt in an administrative proceeding of hearsay evidence is no cause for the reversal of an administrative order. *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 690 (9th Cir. 1949), *cert. denied*, 338 U. S. 860. Nor is the receipt of opinion and hearsay evidence a violation of due process. *Hyun v. Landon*, 219 F. 2d 404 (9th Cir. 1955).

However, although hearsay evidence is admissible under section 7 (c) of the Administrative Procedure Act, it was held in the *Willapoint Oysters* case that administrative findings to be valid, "cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla" (p. 691). The court said that this was precluded by the requirement in section 7 (c) that findings must be "supported by and in accordance with the reliable, probative, and substantial evidence." Nonetheless the court stated that this requirement "does not forbid administrative utilization of probative hearsay in making such findings" (p. 690).

If these principles are binding with respect to the proceeding under consideration and if the Bureau's determination of the appellant's rights to grazing privileges was based wholly upon hearsay evidence which does not fall into any category of exceptions from the hearsay rule, the appellant's contention would have to be sustained and the Bureau's determination vacated. But it is far from clear that these principles are controlling or even applicable in their entirety. In the first place, section 7 of the Administrative Procedure Act, par-

ticularly when read in conjunction with section 5 of the act,⁴ clearly contemplates only a situation where a hearing is required before any initial agency adjudication is made. The burden of proof is on the agency proposing an action and this burden will not be sustained unless the agency can adduce substantial competent evidence, including probative hearsay, to sustain its action. This was the situation in the *Willapoint Oysters* case. But in grazing hearings, the burden of proof is on the appellant. It is therefore up to the appellant to sustain his burden by substantial competent evidence, including probative hearsay. If the appellant is unable to furnish such evidence, it is unnecessary even to look at the evidence offered in rebuttal by the Bureau, for the appellant's case will fail of itself. In this situation it would be immaterial that all the Bureau's evidence was hearsay.

These factors point to a second point of departure from, or qualification of, the principles stated in the *Willapoint Oysters* case. As we have seen earlier, the Taylor Grazing Act provides for a hearing only on appeals. It recognizes that in the absence of an appeal a final adjudication of grazing privileges will be made without a hearing. If so, upon what degree or type of evidence need such an adjudication be based? The only indication is to be found in section 18 of the act (43 U. S. C., 1952 ed., sec. 3150-1). That section provides in pertinent part as follows:

(a) In order that the Secretary of the Interior may have the benefit of the fullest information and advice concerning physical, economic, and other local conditions in the several grazing districts, there shall be an advisory board of local stockmen in each such district * * *.

(b) * * * Each board shall offer advice and make a recommendation on each application for such a grazing permit within its district * * *.

The legislative history of the section, which was added to the act on July 14, 1939, shows that the section was a Congressional recognition of a system and procedure that had been provided for administratively in the Federal Range Code (see 43 CFR, 1940 ed., 501.17-501.19).

Nothing in section 18 or the range code requires the advisory boards to conduct hearings before offering advice and recommendations on grazing applications. Nothing is said about such advice and recommendation being based in whole or in part on competent evidence. Obviously it was thought that local stockmen would have knowledge of local conditions and operations and could contribute valuable views on applications by their neighbors. Some of the knowledge would undoubtedly be personal knowledge based upon observation and ac-

⁴ The portion of section 5 that reads: "In every case of adjudication required by statute to be determined on the record *after* opportunity for an agency hearing * * *" [italics added].

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quaintance. But part of the knowledge would probably be based upon hearsay or other types of evidence not admissible in court proceedings. Certainly there would be personal opinion involved in advice and recommendations, opinions which would not qualify as expert opinion testimony.

But whatever composite elements of evidence might go into making up the advice and recommendation of an advisory board, it seems almost certain that Congress intended that the range manager could rely upon such advice and recommendation and could grant or deny grazing privileges upon the basis of such information even though it might be entirely hearsay so far as the range manager was concerned. Section 18, therefore, definitely supports the view that adjudications by range managers can properly rest largely or entirely upon evidence which would not be competent or even admissible in court proceedings.

The Administrative Procedure Act did not affect proceedings at the local level which became final in the absence of an appeal. The question then is, where an appeal is taken and a hearing is held, must all the evidence utilized below be re-evaluated on the basis of stricter rules of evidence? If so, and a range manager has relied entirely upon the recommendation of the advisory board and has no personal knowledge of the facts upon which the board's recommendation was based, entirely new evidence would have to be adduced at the hearing in support of the range manager's decision and the proceeding, in effect, would be a trial *de novo*.

In view of the evidence presented in this case, as discussed later, it is unnecessary to answer the question raised in the preceding paragraph. I think it is possible to say, however, without contradiction that grazing proceedings are strictly *sui generis*. They do not fit into the pattern of administrative proceedings envisioned by the Administrative Procedure Act; therefore, the extent of applicability of such cases as the *Willapoint Oysters* case to grazing proceedings is not clear.

With this in mind, we turn to an examination of the appellant's claim that all the evidence relied upon by the Bureau was hearsay. In doing this, we must also keep in mind the fact that the burden of proof was on the appellant at the hearing to show error in the range manager's decision and that the Bureau's evidence need be examined only where the appellant produced substantial probative evidence in support of his position.

At the hearing there were two issues involved: (1) the priority established as to each of three parcels of base property—the Bullion ranch, the Home ranch, and the Odiaga ranch, and (2) the place of use of livestock with respect to the Home ranch. On the Odiaga

ranch the range manager allowed a Class 1 demand of 1,744 AUMS. In his appeal to the Director the appellant claimed an entitlement of 2,488 AUMS. The Odiaga ranch was not a Hylton ranch property but the only testimony presented by the appellant was that of Mr. J. L. Hylton. He testified that he was acquainted with the property by reason of being a neighbor but that he had "not very closely" observed operations of the Odiaga ranch during the priority period; that he did "not in a general way" know what the Odiaga operations consisted of or what the rating of the ranch was in the priority period (Tr. 34). He didn't know the season of use, whether 6 or 7 months (Tr. 35). He only had his own idea as to what the rating of the ranch should be (Tr. 34-35). The mere relating of this testimony reveals its almost complete lack of probative value. It falls far short of sustaining the appellant's burden of showing error in the range manager's adjudication of the Odiaga ranch.

As to the Bullion ranch, only a half interest was owned by Hylton during the priority period; the other half interest was owned by the Drown brothers who conducted a separate livestock operation. The priority allowed the ranch by the range manager was computed on a basis fully set forth in the Director's decision. It involved, briefly, determining the Hylton and Drown priorities separately, each on the basis of its relation to the total Hylton and Drown operations, respectively. The net AUMS allowed were 112. The appellant in his appeal to the Director claimed 260 AUMS, basing this on the asserted testimony of Hylton that the Bullion ranch supported 80 cattle and produced hay for that number and on the assumption that the cattle had a 6½-month grazing season. Hylton's testimony was much more vague. He did not recall what feed the ranch produced in the priority period but said it was "very little." In his opinion it would support, as a separate unit, 75 cattle, having the hay for it, but during the priority period it was practically used only for holding cattle, as much as 2,000 head, in combination with other ranches. When asked whether in the combined holding operation the Bullion ranch could be said to be supporting "proportionately" about 80 cattle, he answered "It could be." When pressed whether it could be or actually was so used, he answered: "That would be hard to state. It was to a certain extent. It was used differently." He did state that it was used to its "full capabilities." (Tr. 36-37.) On cross-examination, he testified that some railroad land and 160 acres of Federal range were fenced in with the ranch and that his statement about 75 or 80 cattle included the carrying capacity of those lands (Tr. 39).

This testimony was so vague, equivocal, and conjectural that it cannot be said to sustain the appellant's flat assertion that during

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the priority period the Bullion ranch supported 80 cattle which had a grazing season of $6\frac{1}{2}$ months. Moreover, the appellant's disagreement with the rating given to the Bullion ranch was partly based on the formula used by the range manager (determining the Drown and Hylton priorities separately), which is not a matter of evidence but of administrative practice. In short, the appellant failed to sustain his burden of proving error in the range manager's determination as to the Bullion ranch.

With respect to the Home ranch a number of errors were claimed by the appellant in his appeal to the Director. The first was that the range manager erred in allowing the Hylton operations only 1,970 AUMs on the basis of a $2\frac{1}{2}$ month use of the Federal range by 3,940 sheep. The appellant claimed before the Director that Hylton had grazed 4,000 sheep for $3\frac{3}{4}$ months on the public domain, entitling Hylton to 3,000 AUMs. Mr. Hylton testified positively on a $3\frac{1}{2}$ - to 4-month grazing season for the sheep (Tr. 32, 33, 38, 41, 45), and there was hardly an attempt at rebuttal. However, he also testified that the sheep did not use any base property (Tr. 42).

On this issue the Director raised a question which, although it is not clearly expressed, seems to require a complete reconsideration of the sheep use. The Director said that some of the Hylton base properties were used exclusively by cattle and horses or only slightly by bucks and sick sheep and that it was improper to apportion total sheep use to base properties that were used only occasionally or not at all by sheep. He therefore remanded the case "for a further determination of the dependency by use established on the base properties by the different classes of livestock." This study would appear to encompass the possibility of changing upward or downward the total priority attributed to the use of sheep since it would involve a study of the extent of use by sheep of base property. Consequently, since no ultimate decision has been rendered against the appellant on the issue of sheep use, there is no point in going at this time into the question of the Bureau's evidence on this issue.

The second error claimed was that the AUM's credited to the Home ranch were based upon a determination by Wayne Larson from a bank count that 3,366 cattle were operated off the Hylton ranches. The appellant claimed before the Director that an additional 350 head were operated from those properties and now before the Secretary that the evidence utilized by the range manager was incompetent hearsay. It is unnecessary to analyze the evidence relied on by the range manager, for it is corroborated by the appellant's own witness, Mr. Hylton. After much confused testimony, he finally stated that he ran about 3,700 cattle which included around 350 head owned by his

father and about 325 head of his own that never used the public domain (Tr. 46). Deducting the 325 from 3,700 leaves 3,375, only 9 head more than the 3,366 used by the range manager.

The third error claimed before the Director was the formula used in computing the Home ranch priority. The range manager determined what percentage of all the Hylton base properties was represented by the Home ranch, the determination being based on the AUM rating of each base property. Then he applied this percentage (42.43 percent) to the total range and unfenced private land use made by the entire Hylton operation to determine the priority allocable to the Home ranch. Mr. Hylton testified that he disagreed with the 42.43 percent, that the Home ranch represented 48 to 50 percent of the entire Hylton operation, and that close to 50 percent of all the Hylton cattle were operated from the Home ranch (Tr. 31-32). This testimony does not necessarily conflict with the range manager's decision. Mr. Hylton appears to have been testifying with respect to the number of cattle run from the Home ranch as compared with the total cattle run from all the Hylton properties whereas the range manager was concerned with the carrying capacity of the Home ranch as compared with the carrying capacity of all the Hylton properties. Accordingly, there was no conflict of evidence on this issue.

The final error claimed with respect to the Home ranch was on the issue of the place of use of livestock operated from the Home ranch. The range manager determined that 80 percent of the cattle operated from the ranch ran in the railroad checkerboard area and 20 percent ran south of the checkerboard area. He then made adjustments on the basis of this division. Mr. Hylton's testimony on this point was as follows:

A I don't think Mr. Fallon is very far—I would say between 25 and 30% on those particular properties.

Q Between 25 and 30%?

A Yes.

Q So that you feel the 80-20 division should be adjusted to 75-25 or 70-30?

A In round numbers.

This testimony, while it shows a disagreement with the range manager's determination, is hardly of forceful positive character. It has all the appearance of a rather general recollection on which the witness could not be too precise. The witness was testifying wholly on his memory of grazing operations which had occurred from 18 to 23 years earlier.

However, accepting it as evidence supporting the appellant's position, we turn to see what evidence was adduced in opposition. This evidence was in the form of testimony by the range manager, Mr.

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Fallon, that he believed the 80-20 percent division to be reasonable. He based his opinion on his personal knowledge of the topography of the land, statements in the grazing files, and information from the advisory board (Tr. 15). He did not identify the statements in the files but there is in Hylton Ranches, Inc., license file an application by Hylton Ranches, Inc., dated February 19, 1936, for grazing privileges. This application, signed by D. D. Ogilvie as agent for Hylton Ranches, Inc., contained a description by townships of public domain "normally used by livestock of former owners of Home ranch holdings, to January 1935." Most of the townships listed are in the checkerboard area. Mr. Fallon did not elaborate on what information the advisory board furnished.

It seems apparent that there was no evidence of any conviction on either side. But, even if the indications in the Hylton Ranches, Inc., application and the information supplied by the advisory board are considered to be hearsay which alone would not substantiate the 80-20 percent determination in light of the *Willapoint Oysters* case, it would seem that the testimony of Mr. Fallon based upon personal knowledge of the topography and the habits of cattle was sufficiently corroborative to permit all the Bureau evidence to be used in opposition to Mr. Hylton's general testimony. In my opinion it sufficiently counteracts Mr. Hylton's testimony to warrant the conclusion that the appellant has not sustained his burden of proof on this issue.

To summarize at this point, it is my opinion that, except on the issue of sheep use and possibly on the issue of the 80-20 percent division, the appellant's evidence, meaning Mr. Hylton's testimony, either confirms the range manager's determinations or falls so far short of meeting the burden of proof borne by the appellant as to make it unnecessary to consider the evidence in support of the range manager's determinations. As for the sheep issue, it is moot in view of the remand directed in the Director's decision. As for the 80-20 percent division issue, if Mr. Hylton's testimony is deemed sufficient to meet the appellant's burden, it is effectively countered by the probative hearsay and direct testimony of the range manager.

The discussion which has just been summarized has proceeded with an analysis of the evidence on each controverted issue in order to show the unsoundness of the appellant's contention that he should prevail because the Bureau's case was based entirely on hearsay. This is not to be taken as a concession that the material in the grazing files, such as the Larson summaries of the Hylton properties, constitute hearsay which cannot be relied upon in this proceeding. The Department has held that the official grazing files are public records

of which the Department takes notice in rendering its decisions. *M. P. Depaoli and Sons*, A-25978 (March 29, 1951).

Summaries of grazing operations contained in grazing files are based upon applications filed for grazing privileges, statements by licensees and permittees, independent investigations, and other data. They are prepared by employees of the Bureau as part of their regular functions and in the ordinary course of business. While they may be hearsay in whole or in part in that the person preparing a summary may not have personal knowledge of all or part of the facts contained in the summary, they fall in the category of hearsay which is generally considered to be admissible competent evidence. That such evidence is not only admissible in a proceeding conducted under the Administrative Procedure Act but may be relied upon is clearly stated in the report of the House Committee on the Judiciary on that act (H. Rept. 1980, 79th Cong., 2d sess.). Commenting on section 7 (c), the committee stated:

* * * while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantially of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally applied. They are to govern in administrative proceedings. *These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.* * * * [Italics supplied.]

The fact that the compiler of a summary or report which is introduced into evidence is not present for cross-examination is not violative of the Administrative Procedure Act. This is indicated in the *Willapoint Oysters* case where the court refused to sustain an objection to the admission of certain hearsay evidence "primarily consisting of documentary reports of certain inspectors of the Food and Drug Administration not present for cross-examination" (174 F. 2d at 690). See also *E. K. Hardison Seed Co. v. Jones*, 149 F. 2d 252 (6th Cir. 1945), sustaining the admissibility of the report of a government seed analyst who was not present to identify the report.

It must be conceded that grazing files often contain material which, considered by itself, is almost completely lacking in probative value. For example, the Larson summary of the Hylton operations gives the numbers of livestock as 3,366 cattle, 3,940 sheep, and 150 horses. The summary states as to the source of these figures "See record of Bank Count and Summary in Hylton Ranches, Inc. case file." The only record in the Hylton file is a sheet of note paper carrying the pencilled heading "Lee Hylton Priority—Bank Count" and then a

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pencilled tabulation of numbers of cattle, sheep, and horses for the years 1929 to 1934, inclusive, also a computation of the best 2-year average. The paper is undated and unsigned and does not state whether the figures were taken from bank records or from what bank. This kind of evidence could not stand up against any competent contrary evidence of any substantiality. It just happened in this case that the figure on cattle was corroborated by Hylton's own testimony.

The point made here is that merely because the official files are to be considered as competent evidence, material in a file is not to be accepted as probative simply because it is contained in an official file. The weight to be given a file depends upon the contents of the file. The entire file is to be evaluated along with the testimony and other evidence adduced at the hearing in order to determine where the truth or probable truth lies.

Applying all the tests and considerations which have been set forth in this decision, I conclude that the appellant has failed to show any error in the Director's decision.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

WHETHER EITHER AN APPLICATION UNDER SECTION 18 OF THE ACT OF MARCH 3, 1891 (26 STAT. 1101; 43 U. S. C. SEC. 946), FOR A RESERVOIR SITE OR THE CONSTRUCTION OF A RESERVOIR ON UNSURVEYED LANDS BARS ISSUANCE OF AN OIL AND GAS LEASE UNDER THE ACT OF 1920 (30 U. S. C. SEC. 181 ET SEQ.)

Oil and Gas Leases: Applications

An oil and gas lease offer under the act of February 25, 1920 (30 U. S. C. sec. 181), filed subsequent to the filing of a proper reservoir site application under the act of March 3, 1891 (43 U. S. C. sec. 946), or to the construction of a reservoir, must be rejected as to the land in the site, and the lease when issued should exclude that land. The oil and gas in the area so excluded may be leased only under the act of May 21, 1930 (30 U. S. C. secs. 301-306), to the holder of the site.

Rights-of-Way: Act of March 3, 1891

A reservoir site may be acquired under the act of 1891 either by construction of a reservoir on vacant surveyed or unsurveyed public land or by departmental approval of a map of the site if on surveyed land. A map of a site on unsurveyed land may be accepted for filing and information only.

Rights-of-Way: Act of March 3, 1891

A reservoir site acquired under the act of 1891 either by approval of a map or by construction of the reservoir is subject to any oil and gas lease offer filed prior to the site application or to such construction, and a lease issued to the offeror will include the oil and gas deposits underlying the site.

M-36446

JUNE 25, 1957.

TO THE REGIONAL SOLICITOR, DENVER REGIONAL OFFICE.

This is in response to your memorandum of May 17 asking whether either an application under section 18 of the act of March 3, 1891 (26 Stat. 1101; 43 U. S. C. sec. 946), for a reservoir site or the construction of a reservoir on unsurveyed lands bars issuance of an oil and gas lease under the act of 1920 (30 U. S. C. sec. 181 *et seq.*).

As the wording of the act of 1891 is almost the same as that of the railroad right-of-way act of March 3, 1875 (18 Stat. 482; 43 U. S. C. sec. 934), decisions applicable to the latter are often applied to the former.¹ This is in explanation of some of the footnotes in this opinion.

If a reservoir site application under the act of 1891 is filed prior to a lease offer and the application meets the requirements of the right-of-way regulations, the lease offer should be rejected to the extent of its conflict with the reservoir site and the lease should identify, exclude and except the site from the leased lands.² The reason for the rejection is that upon approval of the right-of-way map accompanying the application, under the doctrine of relation the approval would relate back to the date of filing of the application thus precluding the attaching of any adverse claim to the use of the area in the reservoir site.³ A further reason is that upon such approval the grant of easement made by the act of 1891 would become effective as of the date of filing of the right-of-way application, and thereafter the oil and gas deposits underlying the site could be leased only under the act of May 21, 1930 (30 U. S. C. secs. 301-306) and then only to the holder of the reservoir easement⁴ and its assigns.^{4a}

If a right-of-way application (map, etc.) is filed subsequent to a

¹ *E. A. Wight*, A-24101 (November 5, 1945); *Windsor Reservoir and Canal Co. v. Miller*, 51 L. D. 27, 305 (1925); *T. A. Sullivan*, 38 L. D. 493 (1910); *Allen et al. v. Denver Power and Irrigation Co.*, 38 L. D. 207 (1909); *Battlement Reservoir Co.*, 29 L. D. 112 (1899); *Hamilton Pope*, 28 L. D. 402 (1899); *United States v. Whitney*, 176 Fed. 593 (1910).

² In view of the departmental decision in *Windsor Reservoir and Canal Co. v. Miller*, *supra*, it is the practice to exclude and except reservoir sites granted under the act of 1891 from the lands covered by an oil and gas lease offer when issuing the lease.

³ See *Stalker v. Oregon Short Line Railroad Co.*, 225 U. S. 142 (1912); *Hamilton Pope*, *supra*.

⁴ *Phillips Petroleum Co.*, 61 I. D. 93 (1953); *E. A. Wight*, *supra*; act of May 21, 1930 (30 U. S. C. secs. 301-306).

^{4a} See *Edwin Barrett*, A-26367 (July 19, 1954).

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lease offer and it is not for a site on which a reservoir has been constructed prior to the lease offer, the lease offeror has priority of right to a lease for the oil and gas deposits underlying the site and the lease when issued should not exclude that area. However, the right-of-way map may be approved subject to any valid existing rights without excluding the area covered by the lease. Should a lease be issued to the holder of the site under the act of 1930, that lease should exclude any of the area covered by the lease issued under the act of 1920.

A reservoir site may be acquired under the act of 1891 by construction of a reservoir either on surveyed or unsurveyed vacant public land without filing an application for the site.⁵ Therefore, if the existence of such a reservoir is shown on the land office records, a lease offer filed subsequent to the construction should be rejected to the extent of the conflict and the lease should exclude that area. Of course, if the existence of the reservoir is not shown on the records and a lease is issued without excluding the site, nevertheless the lease would be subject to valid existing rights and as a matter of law the lease would be inapplicable to the deposits underlying the reservoir.

On August 21, 1937 (Denver 045465), the Department approved a letter of the then Commissioner of the General Land Office to a certain firm of attorneys in Denver, containing the following statement concerning a map filed under the act of 1891 before the construction of a reservoir on unsurveyed public land:

* * * Thus it must be held that the company, by filing of its map on November 23, 1932, which was accepted for filing and general information, acquired an inchoate right in and to the right of way over the unsurveyed lands to become fully vested on the approval of an additional map following survey or upon prior construction of the project. The fact that the project affects unsurveyed lands is immaterial since the granting provisions of the act of March 3, 1891, is applicable to both surveyed and unsurveyed lands, the only difference being in the case of unsurveyed lands, the approval of the map as record evidence of the grant must be deferred until after survey of the land.

CHARLES M. SOLLER,
Associate Solicitor.

Approved: June 28, 1957

EDMUND T. FRITZ,
Deputy Solicitor.

⁵ *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 272 (footnote 4) (1942); *Barlow v. Northern Pacific Ry. Co.*, 240 U. S. 484 (1916); *Van Dyke v. Arizona Eastern R. R. Co.*, 248 U. S. 49 (1918); *Minneapolis, St. Paul & Railway Co. v. Doughty*, 208 U. S. 251 (1908); *Jamestown & Northern R. R. Co. v. Jones*, 177 U. S. 125 (1900); *Stalker v. Oregon Short Line R. R. Co.*, *supra*; *Southern Pacific R. R. Co.*, 56 I. D. 197 (1937); *DeWeese v. Henry Investment Co.*, 39 L. D. 27 (1910); *Sierra Ditch and Water Co.*, 38 L. D. 547 (1910); *Anderson et al. v. Spencer et al.*, 38 L. D. 338 (1909); *John B. Wilson et al.*, 27 L. D. 316 (1898); *United States v. Lee*, 110 Pac. 607 (1910).

APPEAL OF CARIBBEAN CONSTRUCTION CORPORATION

IBCA-90

Decided June 28, 1957

Contracts: Additional Compensation—Contracts: Changed Conditions— Contracts: Changes and Extras—Contracts: Interpretation

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shore line where a sea wall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to constitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there was also a "change" in the scope of the work.

Contracts: Additional Compensation—Contracts: Changed Conditions— Contracts: Changes and Extras—Contracts: Interpretation

A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a sea wall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract.

Contracts: Contracting Officer—Contracts: Notices—Contracts: Appeals— Contracts: Interpretation

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural

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requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.

BOARD OF CONTRACT APPEALS

Caribbean Construction Corporation has filed a timely appeal from the findings of fact and decision of the contracting officer dated November 16, 1956, denying two claims of the contractor for additional compensation arising out of the performance of Contract No. 14-04-001-271, dated November 15, 1955.

The contract, which was on U. S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953), provided for the construction of an Additional Section of Intercepting Sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in accordance with the specifications, proposals and contract documents for Project No. 53-103, which included a set of three drawings. The specifications were modified after issuance by three addenda issued in September and October 1955.

The contract provided that work on the project was to commence within 30 calendar days after the date of notice to proceed and was to be completed within 120 calendar days thereof. Section 6-08 of Part I of the specifications provided for the payment by the contractor of liquidated damages at the rate of \$50 a calendar day for each day that it failed to complete the work on time.

Notice to proceed with the work was issued by the Government on December 30, 1955, thus establishing April 28, 1956, as the final completion date. Although the work was not completed and accepted until June 8, 1956 (Tr., p. 51), no liquidated damages were assessed, since the contractor had been granted extensions of time to cover the entire construction period (Tr., p. 401).

Shortly after the completion and acceptance of the work, the contractor requested that the contracting officer issue two change orders to cover the cost of additional work in the performance of the contract. By letter dated June 13, 1956, the contractor requested the issuance of a change order in the amount of \$4,791.25 to cover the cost of removing 87 wood and concrete pilings encountered in the course of the excavation of the sewer. By letter dated June 28, 1956, the contractor requested the issuance of a change order in the amount of \$13,473.38 to cover the abnormal costs of laying the 18" and 20" sections of the sewer line in adverse soil conditions that would not allow normal trench excavation. In his findings of fact and decision, the contracting officer denied both requests, and these denials form the basis of the

claims in the present proceeding. The contractor duly excepted the amounts of both claims in executing its release on contract.

Pursuant to a request made by both parties, a hearing was held at Miami, Florida, on March 4 and 5, 1957, before the undersigned, a member of the Board.

To evaluate the basis of the contractor's claims, it is necessary to understand the background of the construction of the intercepting sewer. This was one of a series of water-front improvements at Charlotte Amalie on the island of St. Thomas in the Virgin Islands. An intercepting sewer of 18" vitreous clay pipe that ran along what was then the shore line had been completed toward the end of 1949 (Tr., p. 420). Shortly thereafter work was started on a sea wall which extended from Fort Christian West to the French Village, a distance of approximately 3,987 lineal feet (see the findings of fact, p. 3), and the area between this sea wall and the old shore line was filled in hydraulically to an elevation of 3.5 feet above sea level, so that a considerable area of new-land was created. This work appears to have been accomplished between 1950 and 1953 (Tr., p. 394). The existing vitreous clay sewer having been found to leak, due to the infiltration of sea water, it was decided to replace it with the cast-iron sewer pipe that is involved in the present proceeding. The main line of the new intercepting sewer constructed by the present contractor runs east slightly uphill from the Lift Station near the French Village quarter of Charlotte Amalie, that is at Station 48+94.5, but at Station 36+70 the course becomes northeasterly, and runs in this direction past NY TVAER GADE, one of the streets of Charlotte Amalie, to the terminal point of the sewer at Station 33+33.3. The main line of the new interceptor sewer, which is approximately 1,560 feet in length, meanders in the same general direction as the old sewer to the north of it, but the two are separated by an area of from 175 to 350 feet (Tr., p. 212). Except for the last few hundred feet at its easterly end, the new interceptor sewer was to run through the area of the hydraulic fill, and it was in this area that the contractor encountered its excavation difficulties (Tr., pp. 281, 334). The eastern section of the sewer was approximately along the old shore line, and it was in this section that the contractor encountered the submerged piling.

All the harbor improvements, including the sewer involved in the present proceedings, were designed by the same consulting engineer, R. L. Kenan. He had, moreover, not only designed the old sewer and the sea wall but had also supervised the work (Tr., p. 394). The contracting officer in the present case, who declared in his findings that the consulting engineer had "comprehensive knowledge of the soil and other conditions existing at the site of the work covered by the contract, as a result of several years' experience with previous con-

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struction in this general location," was himself also the contracting officer for the contract providing for the construction of the sea wall, including the placing of the fill (Tr., p. 413).

The contracting officer declared in his findings that the specifications for the intercepting sewer involved in this proceeding were prepared by the consulting engineer in the light of his knowledge of the situation. However, in the last paragraph of the Invitation for Bids it was stated only that:

The majority of trench for 18" and 20" sewer will be in *dredged fill* and the pipe invert will be approximately 6' to 8' below sea level in trenches 8' to 12' deep. (*Italics supplied.*)

On sheet 1 of the drawings supplied to the contractor a "SITE OF OLD PIER PILES" was indicated.

In Part II of the specifications themselves, various provisions designating the methods to be followed by the contractor in the construction of the sewer were included. The first paragraph of section 1.05 provided that in order to reduce the load of the cover of the pipe to a minimum, "trenches shall be as narrow as practicable, at the same time providing, on each side of the pipe, space necessary for thoroughly tamping the bedding material under and around the pipe." Addendum No. 2 added to this provision the following paragraph:

Trenches shall be not less than 12" nor more than 16" wider than the outside diameter of the pipe to be laid therein, and shall be excavated true to line so that a clear space not less than 6" nor more than 8" in width is provided on each side of the pipe. The maximum width of the trench specified applies to the width at and below the level of the top of the pipe; the width of the trench above that level may be as wide as necessary for sheeting and bracing, and the proper installation of the work.

Section 1.05, as modified by Addendum No. 2, also contained other provisions which were intended to secure a trench true to grade without projections or inequalities. In particular the third paragraph of the section provided:

If, in the opinion of the Engineer, the material at the bottom of the trench excavation is of such a character as to result in unequal settlement of the pipe after backfilling, the trench shall be excavated below grade to the depth directed by the Engineer and backfilled with gravel or other suitable material, and thoroughly tamped to insure a stable foundation.

Section 1.08, which consisted of six paragraphs, as modified by Addendum No. 1, provided in substance for the installation of such sheeting, bracing or shoring as might be necessary to support properly the sides of trench excavations and to prevent any movement that might injure the pipe, diminish the width of the excavation, or endanger adjacent pavement or structures. Sheeting was to be put and left in place in the trenches for the 18" or 20" pipe but elsewhere the Engineer could

order sheeting or bracing left in place or order their removal. The second paragraph of this section included the provision: "The sheeting shall be driven to a depth not less than two (2) feet below the pipe invert and shall be cut off not less than two (2) feet or more than four (4) feet above the top of the pipe immediately before backfilling. This lower portion shall remain undisturbed to be embedded by the backfilling." Section 1.09, as modified by Addendum No. 3, provided:

The contractor shall, at its own cost and expense furnish the equipment for and do such pumping as may be necessary to permit the construction to proceed in an expeditious and workmanlike manner. The ground water shall be lowered to at least one foot below subgrade and the trench maintained dry and firm until after laying of pipe and backfilling to the original water table. * * *

Section 1.13, headed "Laying Cast Iron Pipe", also included a paragraph on pumping which provided:

Trenches shall be kept free of standing or running water while pipes are being laid and until backfilled. The contractor shall provide proper and adequate pumping equipment to keep his work satisfactorily dry.

Finally, section 1.15 designated the methods by which the trenches were to be backfilled. The backfill was to be carefully selected from the excavation, deposited in uniform layers and solidly tamped.

Under the last paragraph of section 1-08 the cost of all such supports as sheeting and bracing left in place was included in "the unit prices bid for sewers of the size and depth specified," and under the terms of the last paragraph of section 1-27 excavation and backfill was included in the unit prices for laying various sections of pipe or installing structures. Section 6-09 of Part I of the specifications set forth in detail how additional compensation should be determined in case changes in the contract should be ordered.

In addition to the provisions of Part II of the specifications dealing with methods of construction, there was also included a series of Special Provisions of a general nature. One of these, section 6.03, headed "Site Investigation and Representations," provided in relevant part as follows:

The Contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, and roads, uncertainties of weather, tides or similar physical conditions at the site, the conformation and condition of the ground, the character, quality, and quantity of surface and sub-surface materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work and all other matters which can in any way affect the work or the cost thereof under this contract. Any failure by the Contractor to acquaint himself with all the information concerning these conditions will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work.

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Mr. Robert E. Holberg, the President of the contractor, and Mr. Glynn F. Eby, the contractor's project superintendent, testified at the hearing concerning the preparations made by them for the performance of the contract and the difficulties encountered by them in constructing the sewer. Mr. Lester M. Marx, the contracting officer, and Mr. Thomas G. Mooney who, during the period of the performance of the contract, was Director of Virgin Islands Public Works for the Office of Territories, and who in such capacity supervised the performance of the contract, testified as Government witnesses. In addition, Messrs. John T. Roberts, Mortimer F. Harris, and Arvin T. Atkins, engineers with many years' dredging experience on Government and private jobs in the United States, testified on behalf of the contractor.

Having obtained a copy of the specifications and read them prior to bidding, Holberg made a trip to St. Thomas by air to go over the site of the job. He arrived at the island between 12:30 and 1:00 p.m. and took a taxi to the site of the job. He walked the length of the projected sewer; visited the Anchor Bar¹ where he talked to some of the local residents, who told him that it was expected that a housing project would be constructed in the filled area, and that a road would be put in there; spent some time verifying "the price of water and aggregate" and the available shipping facilities; and then went back to the airport from which place he telephoned to Mooney but the latter was not in his office at the time, and he decided not to wait for him. He took the five o'clock plane back to Miami (Tr., pp. 8, 15, 135-36). Upon his return to Miami, he called Mr. Martin Chaster, the State Director of the United States Fidelity and Guarantee Company, that had bonded the contractor, Moars and Ewing, which had constructed the existing vitreous clay intercepting sewer. Holberg inquired from Chaster why the sewer had proved unsatisfactory, but he could get no very definite information from him. Moars and Ewing were no longer in business, and Chaster had "merely unhappy memories of the whole thing" (Tr., pp. 216-22).

Holberg was entirely satisfied with the results of the investigation he had made. Apart from the provisions of the specifications themselves, he relied in bidding principally upon the fact that the sewer was to be placed in an area of hydraulic fill. Thus he testified:

¹ The Anchor Bar was a place of conviviality at the terminal point of the projected sewer. Holberg remarked humorously in the course of his testimony that "it sounds like a drunk country. Everything is referenced from a bar to the winery to the distillery to the barrels" (Tr., p. 25).

A hydraulic fill under a supervised design basis is the nearest substance to virgin undisturbed earth that there is, and for matters of excavation you have every reason to believe that in a hydraulic fill you can only pass a hard substance, or a material that will go through the pump and impeller blade, of very small particle size; that because of the fact that it is as much as 80 percent water, sometimes through its placing you get the finest compaction of any type of a controlled fill. As a result of that, in a well compacted, graded, supervised fill, you can expect to know that you have no rock out-croppings or boulders that would be too large or difficult to move; vegetation or tree stumps would not be present; and that when it was cut that it would have the same general characteristics as virgin earth (Tr., p. 12).

Since he had been told that houses and a road were to be constructed in the area, he also concluded that the filled area consisted of classified material (Tr., p. 15). As for the possibility of obstructions in the line of the sewer, he did not expect any other than those indicated on the plan, not only because of the existence of the improvements in the area of hydraulic fill but also because "all the work that had been accomplished had been done under the guidance and direction of the then and still resident Director of Public Works; that the engineer who had designed this interceptor had designed the previous sewer, had designed the hydraulic fill or supervised it during its placings; and that if anyone in the world had any knowledge of either the conditions or the obstructions, these people would" (Tr., pp. 23-24).

After he had been awarded the contract but before he had received notice to proceed, Holberg sent Eby out to the site of the job, where he spent some 10 or 12 days in the first half of December 1955 (Tr., pp. 17-18). Eby talked to the major material suppliers on the island, to Mooney, to various persons connected with the Department of Public Works of the Virgin Islands, and to the owner of a brewery adjacent to the sewer location (Tr., pp. 17-18, 258). Eby, too, walked the length of the sewer but he found no evidence of any material that would be hard to excavate. He also inquired why the contractor on the previous sewer had run into difficulties. He was told that he had struck a number of outcroppings of very hard rock known on the island as "blue bitch" but he was not greatly concerned, since this sewer ran through virgin soil, and under old streets between houses, whereas the new sewer was to be constructed in an open area of hydraulic fill (Tr., pp. 260-61).

Despite his confidence in the condition of the terrain, however, Eby had three test holes dug along the line of the sewer. The holes were about 4 feet square and went down to a depth of 4 or 5 feet. Test Hole No. 1 was dug at about the intersection of Cow Wharf and the sewer line, right by the old brewery, which was towards the east end of the line about 50 feet east of Station 37+57. Test Hole No. 2 was approximately 250 feet west of Station 37+57. Test Hole No. 3 was

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approximately 200 feet east of Station 48+79. The character of the soil in the test holes, which was very similar, except that Test Hole No. 3 revealed more of a black rich-looking clay soil, appeared to be very good, and Eby testified that the subsequent excavation showed that, except in case of Test Hole No. 2, even if the holes had been dug to a greater depth they would not have revealed the conditions actually encountered. Eby also testified that he abandoned digging when he encountered too much water in Test Holes Nos. 1 and 2 to be able to handle it with the pumping equipment he then had, and indeed that his primary purpose in digging the holes had been to test the variations in the transmissibility of water in the material rather than the quality of the material itself, except that he was interested in determining how much shell might be mixed up with the material (Tr., pp. 314-30).

In the initial phase of the excavation of the sewer from the grit chamber to a point near Carioca Street the contractor encountered no difficulties. Indeed, in excavating for the grit chamber the trench was so dry that Eby testified that "many days you could blow dust off the bottom of it" (Tr., p. 340), and the grit chamber, moreover, was 9 feet below sea level (Tr., p. 341). Not only was there no water problem but the soil proved to be so stable that the sheeting required by the specifications was in many places dispensed with and the contractor accepted a change order (No. 4) which included a provision for a credit to the Government by reason of the omitted sheeting (Tr., pp. 383-85). So far as the laterals were concerned, there was never any trouble. The laterals were at a higher elevation than the main line of the sewer, and were never lower than 6 feet, unlike the main line, the bulk of which was at a depth from 8 to 10 feet (Tr., pp. 192-93).

The contractor's luck, however, did not hold out to the end. From Carioca Street to the Cow Wharf neighborhood its luck was extremely bad. In terms of stations this was from approximately Station 45 on the west to Station 37 on the east, a distance of 800 feet (Tr., pp. 281, 334, 372). Both Holberg and Eby testified concerning the conditions that they encountered in this stretch of the excavation, and the testimony of the former was particularly vivid. He seemed, to say the least, to be describing a minor cataclysm of nature. Since they knew that they would be operating well below sea level, both Holberg and Eby had anticipated that they would have a serious dewatering problem but the water proved to be far less than they had expected (Tr., pp. 19, 159, 272). On the south side of the trench that they were excavating the condition of the soil was good almost without exception but on the north side there was encountered a fluid movable type of material that had a tendency to cave in (Tr., pp. 295-96). Yet caving did not prove to be the main problem. As Holberg put it: "The side

walls didn't fall like Jericho" (Tr., p. 167). The main problem arose rather from the tendency of the floor of the trench to push upward, or heave or boil up—all three verbs were used by the witnesses to describe the condition—so that it was difficult to place the pipe in the trench and keep it there. Indeed, the whole trench seemed to be in motion (Tr., p. 27). "One time," testified Holberg, "it moved the pipe as much as three feet. My memory tells me it was five feet, straight up in the air, after it had been laid to grade." Again he testified: "Another time we had completely backfilled a 35-foot wide trench, 14 feet deep, with the heaviest, tightest soil that we could find. And on inspection of the laid pipe that material at the joints had boiled up in the bottom—had raised the pipe and the total backfill on top of it as much as 10 or 12 inches, so it made it impossible to see through the sewer line" (Tr., p. 28). Although water was not a problem in the sense that it was excessive, it became a problem because of the unstable and impermeable nature of the material. Any pressure on the material would bring the water to the surface, and since the water would not run through the material, it was reduced to a gooey state. The workers would sink in it and the pump lines would become clogged. The bottom of the trench was forced up by the horizontal motion of the material toward the center of the trench (Tr., pp. 29–32). Holberg compared the material to a lemon pie. "The meringue on the top of it is the four to seven feet of sandy material; the filling constitutes the 7, 8, 10, or 15 feet of this highly plastic, highly moisture retaining material" (Tr., p. 152). Eby likened the material to jello.

The nature of the material encountered by the contractor compelled changes not only in its planned modes of operations but also the adoption of methods that departed from the requirements of the specifications in important respects. The changes in methods of operation were discussed with Mooney—indeed, they were worked out in cooperation with him—and he acquiesced in their adoption (Tr., pp. 47–48, 54, 288–89, 293).

The contractor had to eliminate a good part of the sheeting because the attempt to drive the sheeting would only disturb the material in the trench, and the sheeting itself might sink out of sight, or could be pulled out after being driven as much as 8 feet (Tr., pp. 29–32, 46). The chief expedient adopted by the contractor appears to have been to overexcavate the trenches. Holberg testified that the trenches were excavated to a width of as much as 60 feet at the top and 20 feet at the bottom (Tr., p. 34), and he commented: "The specification says that you will not excavate the area surrounding the pipe more than 16 inches over the diameter of the pipe. And we did it 16 times the diameter of the pipe" (Tr., pp. 164–65). Eby testified that in the really bad areas the width of the trenches varied from 30 feet to 80 feet

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(Tr., p. 305). The contractor's forces not only kept widening the excavation but also kept unloading the banks, and increasing the angles of the slopes (Tr., pp. 44-45, 165, 168). They would keep on digging until the material had attained its natural angle of repose (Tr., p. 279). Sometimes the pipe was laid while the trench was still wet. As Holberg testified, "we probably departed it in the specification that relates to drying the bottom of the trench. Drying was never defined to degree, but certainly we laid in some pretty wet stuff which could not be construed to be dry at all" (Tr., p. 47). In some particularly bad places the pie could be kept down in the trench only by putting weight on it. Holberg testified to one such instance: "In one area 125 feet long, we took out 800 yards after we had the bottom grade of our trench. We never were able to set the pipe in this material except by weight—by loading the bucket with boulders and keeping 7000 pounds direct weight on top of the pipe to hold it in place until we could get the backfill back on it" (Tr., p. 29). Eby testified that in the worst areas near Station 42 they adopted the expedient of "loading the pipe with a comparatively small amount of backfill in order to allow a consolidation of that backfill, hoping that the consolidation and the weight of finally pushing the moisture out of this very poor clay silt would consolidate the pipe in a position to where I could finally increase the load and bring the backfill back to a uniform grade" (Tr., p. 303). The conditions encountered not only increased the difficulty of placing backfill (Tr., pp. 304-05), but also its amount.

The submerged piling was encountered by the contractor's forces towards the end of May 1956 soon after they had worked their way through the bad ground area. The first indication of piles was on a lateral line running north on Cow Wharf toward the intersection of Crown Prince, the next cross street. Five enormous piles were encountered there. The greatest concentration of piles was, however, from manhole 34-48 to the terminus of the main line at Station 33+33 (Tr., pp. 300, 334). Some of the piles were of very tough Dominican pine, and since they could not be broken they had to be pulled out with a dragline (Tr., pp. 343, 378). In the course of the work the contractor's forces removed all sorts of other obstructions, such as automobiles, sections of boats, barbed wire fencing, antiquated sewer pipe, and solidified concrete bags but the contractor is not seeking additional compensation by reason of such removal (Tr., p. 25).

The three dredging experts called by the contractor all testified that they would not have expected the difficulties encountered by the contractor in an area of hydraulic fill.² As Harris put it, to contractors

² Although the specifications refer to "dredged fill," the terms "dredged fill" and "hydraulic fill" appear to be synonymous (Tr., pp. 427-28).

it was common knowledge that "hydraulic fill is a very good fill, and when they see the words 'hydraulic fill' in a set of plans and specifications, immediately they think this is really a dream-boat to work" (Tr., p. 230). All three experts also agreed that from the appearance of the material on the surface they would have assumed that the fill was classified material of some sort rather than a spoil area for dumping whatever material was dredged from the harbor, and Harris and Atkins were positive that a sea wall would not be put in just to hold a spoil area (Tr., pp. 227-29, 231, 245, 249, 251). However, Roberts conceded that it would not be unusual "for purposes of roadways only to fill on top of an objectionable material, and then build the road on top of that" (Tr., p. 93), and that, in judging the nature of classified fill, "you couldn't determine what it was throughout its depth from looking at the surface" (Tr., p. 133). Harris and Atkins also testified that they would not have expected to find debris of any kind in an area of hydraulic fill (Tr., pp. 238, 252).

Concerning the origin of the unstable material in the fill, Eby testified as follows:

In asking Mr. Mooney how this came to pass, he told me that Mr. Prenn (the contractor), in installing this fill, had a breakdown in his dredge with the cutter head failing to operate. So that instead of the ladder of the dredge traveling up and down the face of the cut, without the cutter head being available, the man merely succeeded in the loose material available, which was this silty, goeey substance, and that he said that at the time they were not able to find a clause in the contract to prevent [sic] him from pumping in this objectionable material, and that is how it came to be located in these odd areas; that it is not a uniform condition through the job (Tr., pp. 295-96).

Mooney, who as Director of Virgin Islands Public Works, was in immediate charge of the construction of the sewer, testified that, despite the difficulties that the contractor had encountered, the work was satisfactorily completed and that it was indeed "a good job" (Tr., p. 377). It was his opinion, however, that the difficulties of the contractor were average for an "unclassified" job,³ and hence were at the contractor's risk. "Sewers," he declared, "are put through quicksand, sewers are put through all kinds of soupy conditions all the time" (Tr., p. 376). However, even Mooney, in testifying that the contractor had encountered far less water than he might have expected, conceded: "His soil did not have the transmissibility that I had logged it at or

³ The witnesses who testified as dredging experts distinguished between "classified" and "unclassified" fill material. A classified fill would be a good fill, put down for building and road beds, while an unclassified fill would be that which merely resulted from deepening and sweeping a channel. However, Atkins testified that the term "hydraulic fill" would in itself denote a classified material. Mooney, on the other hand, in referring to an "unclassified job" meant that the excavation was not classified as to various types of material. Strictly speaking, this was not true, since section 1.27 (H) of Part II of the specifications made special provision for rock excavation (see Tr., pp. 406-07). But no rock was actually encountered (Tr., p. 299).

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anticipated it at. He had a very low transmissibility in his soil" (Tr., p. 383). On cross-examination, he also conceded that the specifications had been prepared in full knowledge of the character of the fill. Thus:

Q. "So the same people that prepared the plans and specifications for this interceptor sewer, which is the subject of this hearing had complete information beforehand both as to exactly what was on the site before the fill was put in and exactly the material that went into the fill.

A. "Yes, sir." (Tr., p. 395.)

In testifying at the hearing, the contracting officer conceded that it had been more costly for the contractor to excavate in the type of material it had actually encountered (Tr., pp. 447-48), but he insisted that it should have been warned of what it would encounter by the reference to "dredged fill" in the specifications. The contracting officer, although he disclaimed any pretense to being a dredging expert, made it clear that he disagreed with the contractor's experts. In his testimony he explained the nature and purpose of the fill, as follows:

* * * From what I have heard here during the two or three days—two days that we have had these hearings—it seems to be the general impression that the fill on this waterfront project was the project. It was not. The waterfront project was for the purpose of deepening the harbor. The sea wall was put in to be used as a pier or a mooring place for boats. The ramp which was built next to it was put there for the purpose of unloading boats. In doing that, the spoil, if you want to call it that—that word has been bandied around here for two days—the spoil or the fill which was necessarily taken out of the harbor—and that was very pointed that the harbor had to be so deep in order to get certain draft boats up against this new dock that we were building; it was a dock rather than a pier; it did not stick out, it went along the shore line.

The filling of the land was incidental. * * *

* * * * *

I know, and I am sure that Mr. Eby and Mr. Mooney and most any engineer knows, that there is just a lot of fill land where you merely take what is in the lake bottom and you throw it up on the shore. If you put it behind a sea wall—one of the witnesses here made a great moment that you wouldn't have gone to a great extent of building a sea wall and putting some bad fill behind it. Why? We wanted the sea wall. We didn't particularly want the fill. The sea wall was for the purpose of deepening the harbor and getting a ramp built next to it, where we could unload boats. We did not need the fill land for any particular building purpose other than to put this ramp on it, and to put a road on it.

One of them asked whether or not it would hold the road. It is holding the road today. The road is completed. It cost a half million dollars. The man talked to me just ten days ago, and I specifically asked him, "Did you have any trouble putting the road?" "None whatever. It has not sunk in any place" (Tr., pp. 422-24).

The contractor contends that it is entitled to recover either under article 3, the "changes" clause, or article 4, the "changed conditions" clause of the contract. Article 3 provided for an equitable adjustment

if the contracting officer should make "changes in the drawings and/or specifications of this contract and within the general scope thereof." Article 4 provided for an equitable adjustment if the contractor should encounter (1) "subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract."

The principal ground upon which the Government opposes the allowance of both of the contractor's claims appears to be that the contractor made only the most cursory investigation of the site, notwithstanding the inclusion of section 6.03, the site investigation provision, in Part II of the specifications. So far as concerns the piling removal claim, which presents by far the simpler problem in applying this provision of the specifications, the Government avers that, although its engineers knew that there had been piles in the area of the sea wall, they had decided not to include any specific information on this subject (except for the indication on the plans of the site of the old pier piles) because the contractor who had constructed the sea wall had been given permission to remove such piles as he could make use of in his work, and because some of the piles had disintegrated, and they were, therefore, no longer certain how many piles remained. In order, however, to provide "a direct and emphatic warning" that piles might be encountered, they determined to include the site investigation provision in the specifications. "The language used and the length of the provision," the Government asserts, moreover, "indicate that it is not a stock phrase or a standard site investigation clause."

In fact, section 6.03 of the specifications is "a standard site investigation clause" that appears to be in common use in contracts made by the armed services.⁴ But, whatever its origin, the valences of allusiveness to be found in the provision do not appear to be such that they could be said to have provided "a direct and emphatic warning" to the contractor. The piles can hardly be said to be "subsurface materials" within the meaning of the provision. There would have been "a direct and emphatic warning" if a reference to "submerged obstructions" had been included in the provision. But such a warning can hardly be said to be found, except in the vaguest terms, in the omnibus clause with which the provision concludes, namely, the clause that refers to "all other matters which can in any way affect the work or the cost thereof under this contract." A more explicit warning was all the

⁴ Identical provisions are to be found in such recent decisions as *Allied Contractors, Inc.*, ASBCA No. 2905, November 7, 1956, 56-2BCA, paragraph No. 1089, and in *Fehlhaber Corporation v. United States*, No. 49316 in the Court of Claims, decided June 5, 1957.

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more necessary, moreover, in view of the fact that it was well-known that the Government engineers were familiar with the topography and history of the area, and that these same engineers had indicated only one site of old pier piles on the plans. If the contractor was at all alarmed by the language of the omnibus clause, the alarm must have been dissipated as soon as the plans were examined. Inasmuch as piles were indicated at a particular place, the contractor was entirely justified in assuming that precisely the same type of obstruction would not be found at other points along the sewer line. In other words, the notation on the plans constituted a positive representation that the contractor would not encounter piles elsewhere along the sewer line, and such being the case there was no good reason why he should make any investigation of the site so far as this question was concerned. As the Court of Claims said in *Arcole Midwest Corporation v. United States*, 125 Ct. Cl. 818, 822 (1953), "the rule is well established that where the Government makes positive statements in the specifications or drawings for the guidance of bidders, that a contractor has a right to rely on them regardless of contractual provisions requiring the contractor to make investigations."

The Government cites *Gillioz Construction Company*, BCA No. 826, October 27, 1944, 2 CCF 1211, in which the Armed Services Board held that the discovery of buried tree trunks in the course of an excavation did not constitute a changed condition entitling the contractor to additional compensation, although the specifications did mention other substances which might be encountered below the surface. This case is, however, clearly distinguishable. The enumerated substances did not include tree trunks; an examination of the site would have revealed that it was cut over land that had been heavily wooded; and the specifications provided that the contractor was to "perform all excavation of every description and of whatever substances encountered."

However, even if it be assumed that the indication of the site of the old pier piles on sheet 1 of the drawings was not a definite representation that other piles would not be found elsewhere, there would still be a firm basis for the contractor's claim. The "changed conditions" clause encompasses two categories, either of which calls for an equitable adjustment. To come within the first category, it is necessary to show merely that the condition encountered differed materially from what was indicated in the contract documents, and such a condition was encountered here, since the indication on the drawing was a representation that piles would not be encountered elsewhere along the sewer line. However, in the second category covered by the "changed conditions" clause, it is sufficient that the contractor has encountered a condition which he could not reasonably have anticipated under the

circumstances of the case. On the basis of the record, the Board would have to conclude that while some piling removal problems would have been normal for an area long used for harbor purposes, the piling actually found, considering their numbers, location, dimensions, materials, and other circumstances created more serious removal problems than the contractor could reasonably have anticipated, and fall fairly within the second category. When this is so, the mere fact that the specifications may contain general warning clauses, such as a site investigation clause, is no bar to the allowance of additional compensation.

The board holds that the contractor is entitled to additional compensation for removing the submerged piling. Even if the contractor were not entitled to recover under the "changed conditions" clause of the contract, it would be entitled to recover under the "changes" clause of the contract. To the extent that the piling actually removed was in excess of that indicated on the plans, there was a change in the scope of the work. Actually, it is not important to determine which clause should be invoked since the same machinery of adjustment is specified in both clauses. As the Supreme Court said in *United States v. Rice*, 317 U. S. 61, 68 (1942): "Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract."

The Government's arguments against the allowance of the contractor's other claim are both more varied and more formidable, at least upon first impression. The applicable specifications are also less clear-cut, and the evidence somewhat conflicting. In the case of this claim the Government not only stresses the failure of the contractor to make a thorough investigation of the prospective job but also various provisions of the specifications themselves prescribing the nature and the scope of the work to be performed that should have amply warned the contractor that the excavation would be difficult. Moreover, the Government also seems to contend that the difficulties encountered by the contractor were due in part at least to its failure to adopt other methods of construction or to the use of improper methods in carrying on the excavation, such as that the trenches were not dug with sloping sides, and were opened too far ahead of actual pipe laying, that spoil banks were created too close to the trench walls, and that the pumps were not continuously operated.

The Government insists that Holberg should have investigated the history of the filled area by talking to Mooney, to the previous contractors and to the local residents, and that he should have studied more carefully the geographic features of such an island as St. Thomas, which, being of volcanic origin and mountainous and much eroded,

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would be more likely to have a harbor, the bottom of which was covered with fine silt. The Government even insists that the contractor should have made test borings prior to bidding, although the contracting officer had seen no necessity for such tests, since they had already been made in connection with the sea wall project (Tr., p. 454).

It must be conceded that the investigation made by Holberg prior to bidding was less than searching, and that the curiosity manifested by him was not overly great. A contractor should not be required, however, to conduct an investigation merely for the sake of investigation. There must be a distinct need for the investigation; the sources of information must be shown to be valuable or promising; and it should appear that the investigation would have produced information that was relevant, if not cogent. In the circumstances of the present case, it is easy to perceive why the contractor's chief officers perceived no need for an exhaustive investigation. Since he knew that the Government had comprehensive information concerning the site, it was reasonable for him to assume that the specifications would be based on such information. Moreover, the appearance of the site, too, was good, and in this site he was to excavate only an extremely narrow trench in which a sewer was to be laid. As Holberg put it: "It doesn't behoove us to take the topography, and the geological, historical record of the composition of the island. We are only going to cover seven feet out of a 23-acre patch" (Tr., p. 141). He testified that he restrained his curiosity about the old sewer, since he did not know as a fact that it would be eliminated or discontinued (Tr., p. 138). Moreover, it has not been shown that the same soil conditions were encountered in the construction of the vitreous clay sewer. On the contrary, the record shows that, in so far as there was any difficulty in excavating for this sewer it was due to the presence of hard rather than soft material, and the infiltration of sea water into the vitreous clay pipe had no connection, of course, with the material in which it was laid. As for talking to people, the record can hardly be said to show affirmatively that any additional information of value would have been obtained by the contractor if he had lingered on the island. It is hardly to be supposed that Mooney or any of the other engineers working for the Government would have proved valuable sources of information when their policy appears to have been to avoid "misleading" the contractor. Certainly the local residents could hardly have supplied more valuable information concerning what would probably be found along the narrow line of a particular sewer. The record shows, indeed, affirmatively that they were quite mistaken in several pieces of information which they did supply (Tr., pp. 296-97, 299). Again to quote Holberg: "I think it is preposterous to assume that

a bar tender or a man stacking barrels or someone unloading a boat at a wharf is in a position to give engineering information on a project" (Tr., p. 137). And Holberg, too, disposed of the contention that the contractor rather than the Government should have undertaken extensive test borings, when he exclaimed: "I don't know what constitutes 'investigation.' If excavating the trench to see if we can excavate it when we did it is excavation, we can't afford that kind of investigation. We have to go broke the hard way, by guessing" (Tr., p. 158). Eby's digging of the three shallow test holes was not really inconsistent with this philosophy, since his purpose was primarily to ascertain the probable amount of water to be encountered.

Of course, if the specifications themselves contained indications of the risks involved in the excavation, the contractor was bound to evaluate them, notwithstanding its knowledge of the plenitude of the Government's information. The crux of the case is, indeed, whether the statement in the invitation for bids that the excavation would be for the most part in "dredged fill" below sea level itself constituted a sufficient warning. This did warn the contractor of dewatering difficulties but since such difficulties proved less than expected, and due allowance had been made for them, they may be dismissed as a relevant factor. As for the term "dredged fill" itself the preponderance of the evidence is to the effect that it would denote, especially in connection with its appearance, a classified fill, rather than a spoil bank area, as the Government seems to contend. It is true that the experience of the contractor's dredging experts was confined to the continental United States but this circumstance alone does not deprive their testimony of its force. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. On the basis of the evidence, the most that can be said in favor of the Government's case is that the term "dredged fill" is ambiguous. But, if so, in accordance with the familiar canon of construction in such cases, the ambiguity would have to be resolved against the Government that employed the term.

The other argument of the Government that the methods of construction prescribed by the specifications themselves constituted sufficient caveats is clearly untenable. The provisions for sheeting and shoring would imply the possibility of some caving, and the provisions for pumping would imply that water was to be expected but neither caving nor water was the main source of the contractor's difficulties. It is also no less clear that the possibility of some unequal settlement of the pipe after backfilling was quite remote from the heaving or boiling of the bottom of the trenches. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly

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abnormal conditions actually encountered by the contractor. Differences are no less real because they are differences of degree, and here the degree of difference was great.

The contention that the contractor's difficulties were in large part due to his faulty methods of excavation, and that he, therefore, had no one to blame but himself is not worthy of serious consideration. The record clearly rebuts any such conclusion. The seemingly minor lapses of the contractor's forces were either simply those that would normally be expected in the circumstances—as Holberg put it they pumped all the time, for instance, “save the times the spark plugs quit and the night the pump man got married” (Tr., p. 30)—or represented efforts to cope with a difficult situation by methods of trial and error. The further contention of the Government that the contractor could have dewatered the soupy mud by the proper use of well points overlooks not only the fact that such a method of dewatering is extremely expensive since it requires special equipment and the services of specialists, as Mooney admitted (Tr., p. 400) but also that this was not the method of dewatering prescribed in the specifications.

The Board holds that the contractor is also entitled to recover such additional costs as were necessarily involved in laying sections of the sewer line in the bad ground area, since it may be said to have encountered subsurface conditions at the site differing materially from those indicated in the contract, as provided in Article 4, the “changed conditions” clause of the contract. In the case of this claim, moreover, it is quite clear that even if this clause of the contract were inapplicable, the contractor would be entitled to additional compensation under article 3, the “changes” clause of the contract, since it is apparent from the evidence that the sewer line could not be successfully laid by following entirely the methods prescribed by the Government in the specifications, and that the methods which proved successful were acquiesced in by the Government. Such departures from the specifications constituted changes within the meaning of article 3 of the contract, and the contractor's request for a change order should have been allowed.

In its original statement of position, the Government also contended that the contractor's claims were barred by its failure to comply with the procedural provisions of clauses 3 and 4 of the contract, which require prompt notification in writing be given to the contracting officer that these clauses will be invoked. The testimony of Holberg and Eby at the hearing establishes that Mooney was notified orally of the claims but suggested that presentation of the claims be delayed until after the extent of the additional work could be determined, and that subsequently the claims were discussed with the contracting

officer who assured Holberg and Eby that he would consider the claims if they could be substantiated (Tr., pp. 206, 286, 290-91). In his findings of fact and decision the contracting officer kept his promise and considered the claims on the merits. It is well settled that the procedural requirements of articles 3 and 4 must be deemed waived if the contracting officer has considered the claims on the merits. In its post-hearing brief the Government seems to recognize this but it still seems to argue that the circumstance that the claims were considered by the contracting officer only as a matter of grace should be taken into consideration in the disposition of the claims. The Board cannot agree, however, that such a factor should be given any weight in considering the claims on the merits.

At the hearing counsel for the contractor stated that the contractor desired to revise the amounts of the claims originally submitted to the contracting officer, and counsel for both parties agreed that in the event of a decision favorable to the contractor, the determination of the amount to be allowed on each claim should be left to the contracting officer (Tr., pp. 3-4, 201-04, 209). The claims are, therefore, remanded to the contracting officer for this purpose. The provisions of Section 6-09 of Part I of the specifications should be followed in determining the amounts of the claims. In case the parties cannot agree upon the amounts of the claims the contractor may take a further appeal to the Board with respect to this issue. The contracting officer should note, however, that he need not allow either claim in any amount in excess of that reserved in the release.

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings and decision of the contracting officer are reversed, and he is directed to proceed as outlined above.

WILLIAM SEAGLE, *Member*.

I concur:

THEODORE H. HAAS, *Chairman*.

I concur in the portion of this opinion which deals with the claim for additional compensation on account of adverse soil conditions. With respect to the portion which deals with the claim for additional compensation on account of the removal of piling, I concur in the result.

HERBERT J. SLAUGHTER, *Member*.

*July 10, 1957***PROPOSED CONTRACT BETWEEN THE UNITED STATES AND THE
KINGS RIVER CONSERVATION DISTRICT****Bureau of Reclamation: Excess Lands**

The Secretary of the Interior lacks statutory authority to permit individual holders of excess lands in the Kings River Conservation District to pay the reimbursable costs administratively allocable to those holdings and thereby be relieved from the limitations on supplying water to excess lands.

Bureau of Reclamation: Repayment and Water Service Contracts

Repayment and water service contracts entered into by the Secretary of the Interior for the utilization of flood control dams and reservoirs operated under the direction of the Secretary of the Army for irrigation purposes must conform with the mandate found in section 46 of the Omnibus Adjustment Act of 1926.

Secretary of the Interior

The Secretary of the Interior is not authorized by Federal reclamation law to agree to provisions in the proposed contract with the Kings River Conservation District whereby individual holders of excess lands will be permitted to pay the reimbursable costs allocable to their excess holdings and thereby be relieved from the limitations on supplying water to excess lands and the consequences of the anti-speculation features of the recordable contracts required by law.

Statutory Construction: Generally

Unrepealed provisions of earlier laws having specific application cannot be infused with new life for the purpose of implementing later law.

Statutory Construction: Administrative Construction

Administrative rulings cannot thwart the plain purpose of a valid law nor can prior administrative practice remedy an absence of lawful authority.

Statutory Construction: Administrative Construction

Administrative rulings and practices cannot enlarge the application of the opinion of the Associate Solicitor dated October 22, 1947 (M-35004), which advised that full payment of the reimbursable costs by a district relieved the excess lands in that district from the statutory restrictions on supplying water to such lands.

M-36457**JULY 10, 1957.****TO THE SECRETARY OF THE INTERIOR.**

You have requested my opinion concerning your statutory authority under Federal reclamation law to agree to provisions in the proposed contract with the Kings River Conservation District whereby individual holders of excess lands will be permitted to pay the reimbursable costs allocable to their excess holdings and thereby be relieved from the limitations on supplying water to excess lands and the consequences of the anti-speculation features of the recordable contracts required by law. See particularly articles 3, 6, and 8 of the proposed contract.

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My opinion is that Congress has not granted to you such statutory authority. Further, fiscal desirability, no matter how impelling, does not suffice as a substitute for that statutory power.

I wish to emphasize at the outset that no criticism is hereby intended on my part of the earnest endeavors of the Conservation District or those who have honestly sought or proposed, in its behalf, a rational and reasonable accommodation of interests connected with the use of the regulated and supplemental supply of water developed by the Army in constructing the Kings River and Tulare Lake Basin Flood Control Project. Indeed, while the excess acreage involved is comparatively large, this supplemental supply is relatively small. Nevertheless, Congress has conditioned the means whereby even such small but vital water supplies can be acquired to supplement those already developed earlier by the landowners.

The statutory authority that you as Secretary exercise in connection with flood control projects providing irrigation benefits is derived from the Flood Control Act of 1944, particularly section 8. (43 U. S. C. sec. 390.) Dams and reservoirs operated for flood control purposes under the direction of the Secretary of the Army after December 22, 1944, may be utilized by you for purposes of irrigation under that act only in conformity with the provisions of the Federal reclamation laws. (Act of June 17, 1902, 32 Stat. 388 and acts amendatory thereof or supplementary thereto.) The specific provision with which you must comply under this mandate is found in section 46 of the Omnibus Adjustment Act of 1926 as amended. (43 U. S. C. sec. 423e.) As codified, that section reads:

No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona

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vide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided, however*, That if excess land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment.

Section 46 clearly requires that you shall contract with an irrigation district or irrigation districts organized under State law. By its very nature, such a contract necessarily imposes a joint liability on all landowners of a district. Further, section 46 stipulates that excess lands shall receive no water from any project or division under your control unless the owners execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to you. The only other specific relief from the requirements relating to recordable contracts comes in connection with the anti-speculation provisions when one-half of the construction charges have been repaid by a district. After that time your approval of the sale price of any of the excess lands in the district is no longer required.

Earlier provisions of Federal reclamation law authorized individual contracts in contrast to the joint liability contract specifically required by section 46. The act of August 9, 1912, as amended (37 Stat. 265; 43 U. S. C. sec. 541 *et seq.*), entitled individual homestead entrymen, who complied with the requirements of applicable provisions of the homestead and reclamation laws, to receive a patent and a final water right certificate upon payment of all sums due the United States from them as individuals. Until such full payment, the United States retained a prior lien on the individual entryman's land. I wish to emphasize the individual obligation there involved.

The provisions of the 1912 act (43 U. S. C. sec. 544) relating to excess lands provided that:

No person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation law, *before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior* as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said law nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction. The above provision shall be recited in every patent and water-right certificate issued by the United States under the provisions of sections 541-543 of this title. [Italics supplied.]

Section 46 of the 1926 act contained no explicit provision such as the one above for release from the excess land limitation upon payment by a district of the full obligation assumed under a joint liability contract. The opinion of the Associate Solicitor, dated October 22, 1947 (M-35004), noted that it was proper to consider acts of Congress passed at prior and subsequent sessions. (Section 5202, Sutherland Statutory Construction (3d Ed., Horack) etc.) He said that consistent with earlier opinions of the Solicitor, section 46 could be construed as merely one element of a comprehensive land-limitation plan. It is the payment of the full obligation by the district under the 1926 act joint-liability repayment contract, as well as the similar payment under the 1912 act individual contract, that relieves the excess lands from the statutory restrictions. It should be noted that unrepealed provisions of earlier law, having specific application, cannot be infused with a new life for the purpose of implementing later law, however worthy the objective. Cf. *Wood v. Broom*, 287 U. S. 1 (1932) and *Colegrove v. Green*, 328 U. S. 549 (1946).

I am aware that Congress in certain instances has granted relief from the imposition of the land-limitation policy, a policy having its roots in the Homestead Act of 1862 and even earlier in the Preemption Acts. For legislative expressions of that policy, applicable to reclamation, see: Reclamation Act of June 17, 1902 (32 Stat. 388); act of June 27, 1906 (34 Stat. 519); act of June 25, 1910 (36 Stat. 835); Warren Act, February 21, 1911 (36 Stat. 925); Patents and Water-Rights Certificate Act of August 9, 1912 (37 Stat. 265); Reclamation Extension Act, August 13, 1914 (38 Stat. 686); Smith Act, August 11, 1916 (39 Stat. 506); Fact Finders' Act, December 5, 1924 (43 Stat. 702); Omnibus Adjustment Act, May 25, 1926 (44 Stat. 639); Columbia Basin Anti-Speculation Act, May 27, 1937 (50 Stat. 208); Tucumcari Project Amendments, April 9, 1938 (52 Stat. 211); Water Conservation and Utilization Act, October 14, 1940 (54 Stat. 1119);

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Columbia Basin Project Act, March 10, 1943 (57 Stat. 14). See also Donaldson, *The Public Domain* * * * (1884), p. 332ff.

The Small Projects Act of August 6, 1956, afforded a measure of relief from land limitations by requiring that contracts stipulate the payment of interest on that *pro rata* share of a loan which is attributable to furnishing irrigation benefits to lands held in private ownership by one owner in excess of 160 irrigable acres. (70 Stat. 1044; 43 U. S. C. sec. 422e.) In establishing the basic policy and then making exceptions such as this to the excess-land provisions incorporated in Federal reclamation law, Congress has indicated clearly and consistently an intention to reserve to itself the determination of those circumstances which may warrant a modification or change in that policy. Those determinations, when legislatively enacted, are clearly within the framework of powers constitutionally vested in Congress. They are illustrated by a number of acts, particularly by the provision of the act of June 27, 1952 (66 Stat. 282), regulating the supply of supplementary water from the San Luis Valley project in Colorado, which provided:

That the excess-land provisions of the Federal reclamation laws shall not be applicable to lands or to the ownership of lands which receive a supplemental or regulated supply of water from the San Luis Valley project, Colorado: *Provided, however, That, in lieu of the acreage limitations contained in such provisions, no landowner shall receive from such project a supplemental or regulated water supply greater in quantity than that reasonably necessary to irrigate four hundred and eighty acres of land served by such project: Provided further, That the provisions of this Act are intended to meet the special conditions existing on the lands served or to be served by the San Luis Valley project, Colorado, and shall not be considered as altering the general policy of the United States with respect to the excess-land provisions of the Federal reclamation laws.* [Italics supplied.]

The obvious legislative import of this latter language is that Congress never intended to provide such relief in prior acts of general application, and it did not intend that this local law should be construed as authorizing general relief. Indeed, the latest amendment to section 46 was required in order to permit you to furnish water "temporarily for a period not to exceed five years" from the date of acquisition by an individual of excess lands through foreclosure, inheritance, and other such means. You were further authorized to agree to the amendment of outstanding contracts to conform to that provision. See the first proviso in section 46 above and the notes to 43 U. S. C., 1952 ed., Supp. IV, sec. 423e. For other variations of relief from excess-land provisions, see: Owl Creek Unit, Missouri Basin, August 28, 1954 (68 Stat. 890); Santa Maria Project, September 3, 1954 (68 Stat. 1190); Washoe Project, August 1, 1956 (70 Stat. 775). No authority to provide administrative relief other than that

noted above was granted to you by section 46 of the 1926 act nor is it to be validly found by implication. The Congress is well aware of the considerations offered both for and against the Federal land-limitation policy.

Indeed, the opinion of the Associate Solicitor, dated October 22, 1947 (M-35004), went no further than to advise that full payment of the reimbursable costs by a district relieved the excess lands in that district from the statutory limitations and requirements. This opinion (M-35004) was construed initially in Administrative Letter No. 303, dated December 16, 1947, from the Commissioner, Bureau of Reclamation, to the Regional and Branch Directors:

* * * In the case of a joint liability contract where the identity of construction charges against specific lands is lacking, payment in full of the joint obligation assumed by the district would be essential to effect this result [of freeing excess lands of acreage limitations restrictions] * * *.

Thereafter, a supplement to Administrative Letter No. 303, dated September 24, 1948, from the Acting Commissioner, transmitted a memorandum from the Chief Counsel of the Bureau of Reclamation and stated as the basis for the new instructions contained therein that:

2. It will be noted that the Chief Counsel's conclusion is that within the terms of the Associate Solicitor's opinion it is possible, in so far as the Federal reclamation law is concerned, for an individual landowner holding excess lands to pay in full construction charges administratively assignable to his holdings and thus free the lands of the acreage limitation * * *.

It is true that contracts were executed during the period from 1949 through 1955 providing for accelerated payments in full of construction charges on excess lands by individuals. No review of these contracts has been undertaken to determine the circumstances under which they were negotiated or their validity under the law. But assuming they were comparable to the proposed Kings River contract, it should be noted that many of those contracts apparently were submitted to Congress under the "legislative oversight" provisions of section 7 of the Reclamation Project Act of 1939 (43 U. S. C. sec. 485f), and thereafter were approved by separate acts of Congress which in some instances granted additional authority to the Secretary or imposed conditions. See, for example, 66 Stat. 754 approving contracts with certain districts on the North Platte project. These submissions are not in conflict with the proposition that Congress has retained control and has not granted the authority claimed in Administrative Letter No. 303, as supplemented. Nor does the disclaimer of administrative intent to submit these contracts to Congress for consideration of their excess-lands provisions gainsay the fact that Congress has not authorized accelerated payments by individual land-

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owners of their aliquot part of the district liability as a means of evading excess land limitations.

Prior practice does not remedy an absence of lawful authority. The purpose of Congress is controlling in determining meaning of a law. *United States v. C. I. O.*, 335 U. S. 106, 112 (1948). As stated by the Supreme Court in another suit involving this Department:

* * * We cannot accept the contention that administrative rulings—such as those here relied on—can thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that “* * * the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.”

United States v. City and County of San Francisco, 310 U. S. 16, 31-32 (1940), citing *Utah Power and Light Co. v. United States*, 243 U. S. 389, 409 (1917).

In a situation somewhat analogous to this, Congress once directed the Secretary of the Interior to allocate tribal lands to the Palm Springs Indians under the General Allotment Act of 1887. After one false start, a schedule was submitted for approval to the Secretary who delayed approval, for policy reasons, while efforts were made to persuade Congress to change the law. A member of the tribe finally sued for his allotment. On behalf of the Secretary, it was argued in the United States Supreme Court that he should not be compelled to carry through a plan of allotment in severalty which in his judgment would operate against the best interests of the tribe. The Court noted, in disposing of that argument, that a number of legislative proposals to adjust this matter either had been rejected by Congress or had failed to receive legislative action. “We think,” said the Court, “the grounds advanced by the Government by way of argument, although not by way of evidence, are inadequate to establish as matter of law that the petitioner has no legal right to a patent. Congress not only has failed to deny these allotment rights by legislation, but has rejected urgent and reiterated appeals from the Department to do so.” Accordingly, the Indian was entitled to invoke the supreme law of the land for his benefit. *Arenas v. United States*, 322 U. S. 419, 433 (1944).

Thereafter, the Secretary was persuaded to exercise an alleged discretion, ostensibly relying on provisions of the 1887 General Allotment Act, and disapprove the allotment schedule, which had languished so long in his office. The Indian again sued. The Court of Appeals sustained the Indian's right and criticized those held responsible for thus attempting to evade the clear mandate of the law. See *United States v. Arenas*, 158 F. 2d 730 (1947); *cert. denied*, 331 U. S. 842 (1947).

The point I wish to make here is that where Congress has directed a course of action, the Secretary is bound to comply with that direction notwithstanding any policy consideration motivated either by realism or by idealism.

As I have heretofore indicated, I perceive no ambiguity in the directive Congress has given you in the 1926 act, as amended. In the evolution of our statutory law it is axiomatic that Congress has the power to amend a law to meet changed conditions or relieve hardship. It can authorize an irrigation project without imposing acreage limitations; it can relieve an existing project from prior limitations; it can permit delivery to excess lands upon payment of interest on reimbursable charges allocable to such lands; and it can direct the Secretary to enter into a particular contract as it did in section 45 of the Omnibus Act of 1926 in connection with the Belle Fourche Irrigation District. But, that type of discretion has not been vested in you as Secretary and therefore remains a prerogative of Congress.

ELMER F. BENNETT,
Solicitor.

JURISDICTION OVER PROPERTY BELONGING TO A FIVE TRIBES INDIAN'S ESTATE

Indian Lands: Descent and Distribution: Generally—Indian Tribes: Particular Tribes: Five Civilized Tribes

The property comprising the restricted estate of a Five Tribes Indian decedent continues restricted and subject to the jurisdiction of the Secretary of the Interior only so long as belonging to Indian heirs of one-half or more Indian blood computed from the final rolls of the Five Civilized Tribes pursuant to the act of August 4, 1947 (61 Stat. 731).

Indian Tribes: Membership—Indian Tribes: Particular Tribes: Five Civilized Tribes—Secretary of the Interior

The authority of the Commission to the Five Civilized Tribes and of the Secretary of the Interior to strike names from the rolls of the Five Civilized Tribes, after notice and an opportunity to be heard, continued to March 4, 1907, when the rolls were closed.

Indian Tribes: Membership—Indian Tribes: Particular Tribes: Five Civilized Tribes—Secretary of the Interior

The fact that an heir who was enrolled with the Creek Tribe of the Five Civilized Tribes had received an allotment of land with another tribe of Indians justified action by the Commission to the Five Civilized Tribes and the Secretary of the Interior striking the heir's name from the Creek roll, which action was final after the passage of the act of April 26, 1906 (34 Stat. 187).

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JULY 12, 1957.

TO THE SECRETARY OF THE INTERIOR.

In a memorandum, dated June 7, 1957, the Deputy Solicitor of this office informed you of the entry by the County Court of Okfuskee County, Oklahoma, of that court's decree in the above estate, whereby the decedent's entire estate, valued approximately at \$90,000,¹ was determined to pass to the decedent's father, William Chisholm, an incompetent. It was pointed out in the memorandum that if William Chisholm is restricted his inheritance would remain under the supervision of the Department, and would not be distributed to his guardian because of an apparently fatal jurisdictional deficiency in the guardianship proceedings.² Moreover, if the property is restricted, the Deputy Solicitor stated that certain fees of the administrator and of his attorney, allowed in substantial sums by the County Court, would be subject to consideration and allowance in reasonable amounts by the Area Office, Bureau of Indian Affairs, rather than in the amounts fixed by the County Court.

The question whether William Chisholm is a restricted Indian was not resolved in this office's memorandum of June 7, 1957, but it was noted that the Regional Solicitor, Tulsa, Oklahoma, had been requested to submit his views on that matter. The Regional Solicitor's views are embodied in a memorandum dated June 13, 1957. It should be stated at this point that the answer to the crucial question whether William Chisholm is or is not restricted, and consequently whether this Department would exercise supervision over his inheritance and consider the payment of fees allowed by the County Court, hinges upon an essential precedent determination whether William Chisholm possesses one-half or more Indian blood of the Five Civilized Tribes, pursuant to the requirements of the act of August 4, 1947, *supra*. Moreover, in determining or computing his Indian blood in that respect, there must be considered section 2 of the 1947 act reading as follows:

Sec. 2. In determining the quantum of Indian blood of any Indian heir or devisee, the final rolls of the Five Civilized Tribes as to such heir or devisee, if enrolled, shall be conclusive of his or her quantum of Indian blood. If unenrolled, his or her degree of Indian blood shall be computed from the nearest

¹ The estate of Buster Chisholm represents for the most part that decedent's inheritance from his prior deceased wife, Martha Jackson Chisholm, a full-blood Creek Indian, whose estate was the subject of Solicitor's opinion (64 I. D. 17), approved by the Secretary of the Interior on January 4, 1957.

² The apparent defect in this respect stems from the lack of service of written notice of the pendency of the guardianship proceedings upon the Superintendent (Area Director) for the Five Civilized Tribes, pursuant to the provisions of section 3 of the act of August 4, 1947 (61 Stat. 731). Such defect would require further consideration only in the event it is determined that William Chisholm is a restricted Five Tribes Indian.

enrolled paternal and maternal lineal ancestors of Indian blood enrolled on the final rolls of the Five Civilized Tribes.

An answer to the question whether William Chisholm is enrolled within the terms of the first sentence of the above-quoted provisions of section 2 would appear to be decisive of the question whether he is a restricted Indian. This is so because, on the basis of a finding that William Chisholm is unenrolled, the second sentence of section 2 of the 1947 act could apply only where Indian blood can be computed from his enrolled paternal and maternal lineal ancestors, none of whom appears to be on the rolls.

It is reported that William Chisholm, applying under the name of "Willie Chisholm," was enrolled by the Commission to the Five Civilized Tribes, hereafter referred to as the Commission, with the Creek Tribe as a one-half blood Indian opposite No. 9295. That enrollment was approved by the Secretary of the Interior on November 14, 1902. Subsequently, on August 9, 1904, through the conjoint action of the Commission and the Secretary of the Interior, Willie Chisholm's name was stricken from the Creek roll. This action was taken on the specific ground that William (Willie) Chisholm had been allotted lands as Absentee Shawnee Allottee No. 40, which lands were sold under a deed approved by the Department on October 17, 1901. The action striking Willie Chisholm's name from the roll was taken after he had been advised by a registered letter from the Commission, the receipt of which by him is evidenced by a return registry receipt, that he was allowed 30 days from the date of the Commission's letter to show cause why his name should not be stricken from the roll for the reasons stated. Apparently no action was taken by Willie Chisholm, or by anyone in his behalf, after the receipt of the Commission's letter.

It is the view of the Regional Solicitor that Willie Chisholm, having been allotted lands as Absentee Shawnee Allottee No. 40, afforded no legal basis for the action of the Commission and the Secretary of the Interior in striking his name from the Creek roll. Accordingly, the Regional Solicitor has recommended that the action of striking Willie Chisholm's name should be regarded as a nullity, and that his name should be treated as still upon the final Creek roll for all purposes. This office cannot agree with those recommendations.

Pursuant to the authority of various acts of Congress, the Commission prepared rolls of members of the Five Civilized Tribes, which rolls in turn were submitted to the Secretary of the Interior for approval.³ Moreover, by section 21 of the act of June 28, 1898, the Commission was required to investigate the right of persons whose names are found on the rolls, and to make correct rolls of the citizens by

³ Acts of June 28, 1898 (30 Stat. 495, 503); March 1, 1901 (31 Stat. 861, 870).

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blood "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto * * *." It is apparent that the authority of the Commission and of the Secretary of the Interior to consider and approve enrollments and to strike the names of persons not entitled to be shown on the rolls constituted joint action by them, as is demonstrated in the present case. Moreover, upon the termination by Congress of the Commission on July 1, 1905,⁴ the Congress subsequently provided⁵ that on and after July 1, 1905, all of the powers theretofore granted to the Commission were conferred upon the Secretary of the Interior. The Secretary's authority over Five Tribes enrollments, including the Commission's power in that respect, bestowed upon the Secretary by the 1905 act, continued until the rolls were closed on March 4, 1907, when the Secretary's jurisdiction in that respect ceased.⁶

The authority mentioned above to investigate enrollments and to strike or eliminate names placed on the rolls is clearly established where the striking was accomplished after notice of such intended action and an opportunity was given to be heard,⁷ as was done in the present case. However, as stated above, the view has been offered that the reason given for striking the name of Willie Chisholm from the Creek roll was outside the statutory basis for striking, i. e., enrollments procured "by fraud or without authority of law." Neither the Commission nor the Secretary of the Interior apparently deemed it necessary to pass specifically upon the possibility that fraud, as defined in its constructive sense,⁸ may have been present because of the apparent failure of Willie Chisholm to advise the enrolling authorities that he had been allotted lands, which he sold, as Absentee Shawnee Allottee No. 40. However, upon learning of such facts the Commission and the Secretary of the Interior regarded those factors as a sufficient basis for striking Willie Chisholm's name from the Creek rolls, and ordered the Creek allotment deeds, which had been executed and approved, but not delivered to him, canceled.

No basis is seen whereby this Department could or should attempt to set aside the departmental action taken over 52 years ago, striking Willie Chisholm's name from the Creek rolls. Aside from a limitation in section 1 of the act of April 26, 1906, *supra*, which would appear to bar a move at this time to reopen any Five Tribes enrollment case,⁹ the Secretary of the Interior had also lost jurisdiction to

⁴ Act of April 21, 1904 (33 Stat. 189, 204).

⁵ Act of March 3, 1905 (33 Stat. 1048, 1060).

⁶ Sec. 2, act of April 26, 1906 (34 Stat. 137, 138).

⁷ *United States ex rel. Lowe v. Fisher*, 223 U. S. 95 (1912).

⁸ *Black's Law Dictionary* (3d Ed.), p. 813.

⁹ "Sec. 1 * * * and no motion to reopen or reconsider any citizenship case, in any of said tribes shall be entertained unless filed with the Commissioner to the Five Civilized

correct or revise the rolls at any time after March 4, 1907.¹⁰ Thus, it is believed that the action taken on August 9, 1904, striking Willie Chisholm's name from the Creek roll is correct and cannot be disturbed. The action taken in that respect was expressly noted at that time as being in accord with departmental precedent,¹¹ and transactions based on similar actions have had the support of judicial decisions.¹² In fact, the *Mandler* case involved circumstances closely similar to those involving Willie Chisholm. The Indian there concerned had likewise received an Absentee Shawnee allotment, after which a Creek allotment was made to her. Upon learning of the Shawnee allotment, action was likewise taken by the Commission and the Secretary of the Interior, striking the Indian's name from the Creek rolls and canceling the Creek allotment and deed. The court, on rehearing, referred to sections 3 and 28 of the Creek agreement, ratified and confirmed by the act of March 1, 1901,¹³ and then reached the following conclusion:

* * * We think that it was the intent of the treaty provisions, referred to above, to exclude Indians who had received allotments as members of other tribes. If this be true, when the Interior Department allotted a tract of land to Nan-pe-chee Polecat as an absentee Shawnee and issued a patent therefor to her, it exhausted its power in the premises. Any subsequent allotment to her as a member of any other Indian tribe was without authority of law, void, and subject to collateral attack. [P. 714.]

Thus, it would appear that when an allotment was made to William (Willie) Chisholm as Absentee Shawnee No. 40, his subsequent enrollment as a Creek and the consequent allotment of Creek lands to him were improper. Accordingly, the action of striking Willie Chisholm's name from the Creek roll appears to have been the lawful exercise in the circumstances of authority vested in the Commission and the Secretary of the Interior. It is recommended that the joint action of the Commission and the Secretary of the Interior in that respect be not disturbed.

From the foregoing, it seems clear to us that the name of William (Willie) Chisholm cannot be regarded as appearing on the final rolls

Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this Act, in which cases such motion shall be made within sixty days after the passage of this Act * * *." [Italics supplied.]

¹⁰ Sec. 2, act of April 26, 1906 (34 Stat. 137); *Lowe v. Fisher*, *supra*.

¹¹ Sallie Lewis (Letter dated February 5, 1904, letter book, pp. 173-180).

¹² *Mandler et al. v. United States*, 49 F. 2d 201 (10th Cir. 1931), rehearing denied, 52 F. 2d 713 (1931); see also *Kemohah et al. v. Shaffer Oil & Refining Company et al.*, 38 F. 2d 665 (D. C. N. D. Okla., 1930), affirmed, *Tiger v. Twin State Oil Company et al.*, 48 F. 2d 509 (10th Cir. 1931).

¹³ 31 Stat. 861, 862, 869. "All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be * * *." [Sec. 3.]

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement." [Sec. 28.]

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of the Five Civilized Tribes.¹⁴ Accordingly, under the provisions of the 1947 act, *supra*, the property inherited by William Chisholm from the estate of Buster Chisholm is not subject to Federal restrictions. It follows that the Area Director should proceed with the distribution of the Buster Chisholm estate accordingly. It is so recommended.

ELMER F. BENNETT,
Solicitor.

Approved: July 12, 1957.

FRED A. SEATON,
Secretary of the Interior.

APPEAL OF PAUL JARVIS, INC.

IBCA-115

Decided July 19, 1957

Contracts: Interpretation—Contracts: Changed Conditions—Contracts: Changes and Extras

Under a contract for the alteration of a diversion dam and the enlargement of a canal, the claim of a contractor for compensation to cover the cost of providing added protection for the dam as a result of the closing by the Government of the headworks of the canal in order to control an earth slide which occurred at a time when the contractor, with the permission of the Government, was using the canal for diversion purposes, cannot be allowed under either the "changes" or "changed conditions" clause of the contract. By permitting the contractor to proceed with such water control plan the Government did not warrant that the canal would remain open even if repairs were required because of an accidental earth slide into the canal. A provision of the specifications that the contractor was to pass 800 cfs of water through the canal, after the end of the time allowed for its enlargement, did not create a duty on the part of the Government to allow the contractor, under all circumstances, to pass that amount of water through the canal.

Contracts: Damages: Unliquidated Damages

A claim of a contractor for damages for delay in its work and additional expense, allegedly due to the violation by the Government of express or implied obligations of cooperation, is based on a breach of contract, and may not be administratively determined.

Contracts: Damages: Unliquidated Damages

A claim of a contractor for costs incurred during a shutdown allegedly due to Government regulation of storage and diversion upstream from a dam, in violation of an express or implied agreement of the Government, is based on a breach of contract, and may not be administratively determined.

¹⁴ On the final Creek roll by blood, authorized to be printed by the act of June 21, 1906 (34 Stat. 325, 340), the following notation appears opposite the number 9295, which had been assigned to Willie Chisholm, "Stricken from roll."

BOARD OF CONTRACT APPEALS

Paul Jarvis, Inc., has filed a timely appeal from the findings of fact and decision of the contracting officer dated March 20, 1957, denying two claims for additional compensation under Contract No. 14-06-D-1259, dated May 6, 1955, with the Bureau of Reclamation.

The contract, which was on U. S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953), provided for the construction and completion of Prosser Diversion Dam alterations and Chandler Canal enlargement, Station 1+93.7 to Station 128+80, under the schedule of Specifications No. DC-4359, Kennewick Division, Yakima Project, Washington.

Four claims for additional compensation were reserved by the appellant's release on contract filed under the contract with an accompanying letter dated January 18, 1957. Two of these claims were allowed by the contracting officer in his decision of March 20, 1957, and his findings concerning them have been accepted by the contractor. The two remaining claims, designated in the release on contract as Claims Nos. 2 and 3, are the subject of the present appeal.

Claim No. 2

This claim, in the amount of \$6,236.58, is based on the ground that the contractor was put to added expense because the Government closed the headworks of the Chandler Canal at a time when the contractor was using the canal to divert a part of the flow of the Yakima River around the Prosser Diversion Dam.

Prior to the incident which gave rise to this claim, the contractor had filed with the Government a water control plan showing its proposed methods for diverting the river and protecting the dam while construction work was in progress. On June 30, 1955, the contractor was given permission to place the plan in operation, but was officially advised that the plan provided no protection between Stations 2+28 and 6+27 and between Stations 7+53 and 8+80 of the dam, and was also advised that, if the river run-off could not be cared for "entirely by diversion through the canal and a breach through the dam," the necessary additional protection would be the contractor's responsibility.¹

As of July 31, 1956, while the contractor was working on the Prosser Diversion Dam, water in the amount of approximately 1,000 cubic feet per second was being discharged through the canal headworks at the left side of the dam into the Chandler Canal, and the remaining flow of the Yakima River, amounting to about 900 cfs, was being passed through a sluiceway section of the diversion dam.

¹ Government letter of June 30, 1955 (Exhibit 5 to Findings of Fact of March 20, 1957).

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On that date, the Government closed the gates by which the water was released into the Chandler Canal because of a slide of earth material into the canal. As a result of the closure, some of the approximately 1,000 cfs of water, previously being discharged into the canal, flowed over the diversion dam into an area where the contractor was performing work under the contract. Accordingly, the contractor was compelled for the first time to protect this area by placing sand bags on the crest of the dam, between the stations referred to at the beginning of the discussion of this claim, in order to divert all the water through low points in the dam, and by strengthening a dike below the dam. This protection was necessary in order to permit the continuance of the work.

The Government proceeded to repair the damage to the canal caused by the slide and reopened the headgate on August 20, 1956. The contractor does not contend that the slide was attributable to any fault or negligence of the Government, or that the Government failed to use due diligence in making repairs.

The contractor's claim is for costs incurred in placing and removing the sand bag protection and the material used to strengthen the dike, and for loss of time and efficiency of personnel and equipment by reason of the water that flowed or seeped into the construction area.

The Government concedes that the contractor's water control plan would have been fully adequate for the conditions actually encountered had the Government not closed the canal headgates, thereby forcing over the crest of the diversion dam water which had been previously discharged into the canal. It points out, however, that the water overflowed the sections of the dam where the Government by its letter of June 30, 1955, had advised additional protection might be required.

The contractor contends that paragraph 36 (b) of the specifications contained a condition or promise on the part of the Government that 800 cubic-feet-per-second flow of water would be diverted through the Chandler Canal continuously during the period after the canal enlargement had been completed, and that the contractor had a contractual right, express or implied, to have this condition exist throughout the period when the gates of the canal remained closed because of the slide.

Paragraph 36 (b) of the specifications provided that prior to beginning any work on the diversion of the river, the contractor should submit a water control plan, showing his method for diversion of the river, which should be subject to approval; that the plan might be placed in operation upon its approval, but that the contractor should not be relieved thereby of full responsibility for the adequacy of the diversion and the protective works; that flow of water into the Chand-

ler Canal would be discontinued for the period of 130 days, running from date of receipt of the notice to proceed, allowed by the contract for the completion of the canal enlargement; and that after the end of that period "the contractor shall provide for and pass 800 cubic-feet-per-second flow of water through the enlarged canal."²

The Board cannot agree with the contractor's interpretation of paragraph 36 (b) that it imposed a duty upon the contractor to provide for the diversion of the water, including the diversion of 800 cfs flow of water through the enlarged canal, and that this "duty" created a corollary right on the part of the contractor to the continuous passing of exactly 800 cfs flow of water at all times and under all conditions. Even if it were to be assumed that this paragraph of the contract or the subsequent approval of the contractor's water control plan gave the contractor a "right" to use the canal for river diversion purposes, this would not amount to a warranty that no accidents, such as the earth slide, would occur that might preclude the canal being used for those purposes. Nowhere in the contract is there an express undertaking by the Government to permit the contractor to divert water through the canal at times when to do so would involve a serious threat of injury to the canal because of an accident that was beyond the control of the Government. Nor can an implied undertaking to this effect be drawn from the circumstances. If the parties had intended that the Government was to be charged with the unusual responsibility of warranting that the canal would remain open, even if accidents occurred that necessitated its closing for repairs, it is only reasonable to assume that so extraordinary a responsibility would have been clearly provided for and not left to mere implication or inference.

The conclusion is inescapable that under paragraph 36 (b) the Government was at most granting to the contractor permission to make use of the canal as an aid to the completion of its work, and was not assuming a duty to keep the canal open for diversion purposes irrespective of whether it was reasonably possible for the canal to be used for those purposes.

In any event, the claim of the contractor is basically that the Government by its acts caused the contractor to be delayed in its work and to be put to additional expense and thus violated express or implied obligations of the contract to cooperate with the contractor and not to hamper its performance. The Board can find in the facts of the present case no circumstance that would amount to a "change"

² Paragraph 36 (b), in the form in which it stood when the invitation for bids was issued, provided that the flow of water into the canal would be discontinued during the period from April 20, 1955, until September 1, 1955. This period was changed to one of 130 days, running from receipt of the notice to proceed, by Supplemental Notice No. 1, which was issued by the contracting officer under date of March 11, 1955, and accepted by the contractor under date of March 25, 1955.

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within the meaning of clause 3 of the General Provisions or to a "changed condition" within the meaning of clause 4 of the General Provisions, or that would otherwise bring the instant claim within any provision of the contract permitting the allowance of an equitable adjustment in the contract price by administrative action.

It is, therefore, clear that whatever remedy the contractor may have, if any, would be based on a breach of contract by the Government. In fact, the brief of the contractor states that the contractor is entitled to recover on the grounds of "breach of an express term" of the contract, "breach of warranty by misrepresentation," "misrepresentation," and "breach of an implied term" of the contract.³ It is well settled that a claim based on breach of contract is beyond the scope of the authority to settle disputes possessed by the contracting officer and this Board under clause 6 of the General Provisions.⁴

Claim No. 3

Claim No. 3, in the amount of \$5,972.55, is for costs⁵ incurred during a shutdown in January 1956, allegedly due to Government regulation of upstream storage and diversion. The contractor states that the costs were due to the necessity of holding personnel on the job, while waiting for the Government to reduce river flows by closure of upstream reservoir gates.

The contractor contends that during December 1955 it secured from a representative of the Bureau of Reclamation an agreement by which the Government would regulate and control several Government storage dams, upstream from the Prosser Diversion Dam, so as to draw down the reservoirs at a rate as fast as possible and then close the reservoir gates for as long as possible; that during January 1956 it secured a further agreement that the gates would be closed by the middle of that month and would remain closed until at least the middle of February; and that the Government violated these agreements. The contractor maintains also that the Government operated the upstream reservoirs in ways that violated implied conditions of

³ Appellant's brief, p. 2.

⁴ *Continental Illinois National Bank v. United States*, 126 Ct. Cl. 631, 640-41 (1953); *Electric Engineering and Construction Service, Inc.*, 63 I. D. 75 (1956).

⁵ The costs are divided as follows:

Payroll for month of January 1956-----	\$3, 855. 97
Taxes-----	337. 55
	<hr/>
	4, 193. 52
Equipment depreciation—1 month-----	1, 000. 00
	<hr/>
Total-----	\$5, 193. 52

The difference between this figure and that given in the text is apparently claimed as an allowance for overhead and profit. (Exhibit 4 to Findings of Fact of March 20, 1957, consisting of a letter from contractor dated November 9, 1956.)

the contract to the effect that the Government would cooperate with the contractor in regulating reservoir discharges, would notify the contractor of failures to close the reservoir gates, and would not interfere with or delay the contractor. Its contentions concerning both the express and the implied provisions or conditions alleged by it to exist are summed up in the statement that "the contractor is entitled to recover for breach of contract, breach of warranty by misrepresentation and misrepresentation."⁶ The Government maintains, on the other hand, that there was no violation of any agreement or obligation of the Government.

It is clear that the contractor's claim is based on an alleged breach of contract, which an administrative official or officials, including this Board, is not authorized to determine.

The same principles which were discussed with reference to Claim No. 2 are equally applicable to Claim No. 3. As the claim rests upon a breach of contract, it is beyond the jurisdiction of the Board to consider or allow it.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer, dated May 6, 1955, denying the claim of the contractor, is affirmed.

THEODORE H. HAAS, *Chairman.*

I concur:

WILLIAM SEAGLE, *Member.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

MAHAFFEY LIVESTOCK, INC.

A-27441

Decided July 22, 1957

Grazing Permits and Licenses: Federal Range Code—Grazing Permits and Licenses: Adjudication

Where subsequent to a decision of a hearing examiner a provision of the Federal Range Code relating to the method of computing the dependency by use or priority to be attached to base property is amended to provide a more liberal formula than that permitted under the terms of the previous code, the amended provision should be applied in adjudicating the future grazing privileges of an applicant for grazing rights.

Grazing Permits and Licenses: Base Property (Land): Dependency by Use

Where the dependency by use of base property is determined on the basis of the record of forest permits issued to the applicant's predecessors and

⁶ Appellant's brief, pp. 7 and 8.

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the applicant shows that permits for additional livestock from the same base may have been overlooked but the evidence in the record is inconclusive, the case will be remanded for a redetermination of the priority of the base property.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mahaffey Livestock, Inc., has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated November 1, 1956, which affirmed in part the decision of the hearing examiner, dated June 8, 1955, which made certain findings regarding the commensurability and dependency by use of the appellant's base property.

On December 20, 1953, the appellant filed an application for a license to graze upon the Federal range in Idaho Grazing District No. 4 a total of 13,160 animal unit months during the 1954 grazing season. In addition, the appellant applied for non-use authorization for a total of 10,120 animal unit months, making a grand total of 23,280 AUMS.

By letter dated March 3, 1954, the district range manager notified the appellant that a license would be granted it to graze a total of 10,353 AUMS on the Federal range, and granted an additional 746 AUMS as "qualified non-use," thus reducing the active use 2,807 AUMS and the non-use 9,374 AUMS from what the appellant applied for.

From this decision an appeal was made to the hearing examiner, and a hearing was held on December 3, 4, and 6, 1954.¹

On June 8, 1955, the hearing examiner issued his decision which concluded that the appellant's base property originally qualified for 12,994 AUMS, but that through appellant's failure to exercise the full range privileges it applied for in 1954, under the provisions of section 161.6 (c) (9) of the Federal Range Code (43 CFR, 1954 ed.), the appellant's base properties had lost their dependency by use in excess of 7,712 AUMS.

In reaching his determination that the appellant's base property originally qualified for 12,994 AUMS, the examiner discussed the three principal divisions of the base property, i. e., the "Original Base," the Benson property, and the Idaho Livestock Company property, and assigned priorities to them as follows:

Original Base	AUMS.
Benson Base	
Idaho Livestock Base	
Total	
	8,450
	583
	3,961
	12,994

¹ The appellant had also appealed to the examiner from decisions dated March 14, 1952, and March 10, 1953, which denied in part his applications for grazing privileges for the 1952 and 1953 grazing seasons, respectively. The issues involved in those appeals were essentially the same as those involved in the March 3, 1954, decision and were therefore covered by the hearing.

In its appeal to the Director from the examiner's decision, the appellant contended the examiner had erred in finding that its base properties were originally qualified for only 12,994 AUMS whereas the qualification should be for 19,589 AUMS, and that the appellant had not lost its dependency by use in excess of 7,712 AUMS.

In his decision of November 1, 1956, the Director concluded: (1) that the appellant owns or controls base property commensurate for 3,094 animal units; (2) that the appellant's base property has a dependency by use or priority of 11,094 AUMS; and (3) that the appellant's base properties have not lost their dependency by use under the provisions of section 161.6 (c) (9) of the Federal Range Code then in force. To arrive at the figure of a total priority of 11,094 AUMS, the Director re-appraised the three divisions of the appellant's base properties as follows: Original Base, 6,957 AUMS; Benson Base, 540 AUMS; Idaho Livestock Base, 3,597 AUMS.

In its appeal to the Secretary, the appellant states that the Director's decision is in error in the following respects:

(1) In fixing the priority of the "Original Base" lands at only 6,957 AUMS.

(2) In fixing the priority of the "Benson Base" lands at only 540 AUMS.

(3) In limiting the appellant's base property to a dependency by use or priority of 11,094 AUMS.

The appellant expressly states that it is raising no issue with the Director's decision so far as the Idaho Livestock Base is concerned. It is necessary therefore to consider only the correctness of the Director's decision with respect to the Original Base and the Benson Base.

Original Base

In his decision regarding the priority of the Original Base properties, the Director stated as follows:

Based upon the number of livestock shown by the mortgages, and the period of use above set forth, i. e. 5½ months for cattle, 5½ months for horses and 3½ months for sheep plus 1250 sheep for four months at 40 percent Federal range use, it is determined that appellant's predecessor in interest customarily and properly utilized public domain feed in the following amounts:

	AUMS
July 1, 1929 to Dec. 31, 1929	3843
Jan. 1, 1930 to Dec. 31, 1930	5782
Jan. 1, 1931 to Dec. 31, 1931	7581
Jan. 1, 1932 to Dec. 31, 1932	8601
Jan. 1, 1933 to Dec. 31, 1933	9160
Jan. 1, 1934 to July 1, 1934	3318

The average annual amount of forage that was utilized by the livestock operation during the above priority period is concluded to be 7657 animal unit

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months.³ [Reference to section 161.2 (g) (1) of the Federal Range⁴ Code in existence at the time of the hearing.] As stated in the Hearing Examiner's decision, appellant's predecessor made two transfers in the total amount of 700 animal unit months from this base property. These transfers would reduce the priority of the original base property to 6957 animal unit months.

The appellant does not dispute the figures used by the Director quoted above, but contends that the method of computation from these figures of the total AUMs to which it is entitled was in error. The appellant asserts that the Director should have chosen the two best consecutive years, 1932 and 1933, in the priority period and divided the sum of the addition of the AUMs in these years by 2 to determine the grazing privileges for the Original Base properties. Using this method the total AUMs is 8,880 AUMs, rather than the lesser sum of 7,657 AUMs determined by adding the sums of each of the 5 priority years and dividing by 5.

The Federal Range Code of March 16, 1938 (3 F. R. 604), provided in section 2 as follows:

(g) *Land dependent by use* means forage land which was used in livestock operations in connection with the same part of the public domain, which part is now Federal range, for any three years or for any two consecutive years in the 5-year period immediately preceding June 28, 1934, and which is offered as base property in an application for a grazing license or a permit filed before June 28, 1938. Land will be considered dependent by use only to the extent of that part of it necessary to maintain the average number of livestock grazed on the public domain in connection with it for *any three years or for any two consecutive years, whichever is the more favorable to the applicant, during the 5-year period immediately preceding June 28, 1934.* [Italics supplied in last sentence.]

In 1942, this provision was revised to read as follows (43 CFR, Cum. Supp., 501.2):

(g) "Land dependent by use" means forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 5-year period immediately preceding June 28, 1934 (hereinafter referred to as the "priority period"), was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years in connection with substantially the same part of the public domain, now part of the Federal range, except that in any area placed within a grazing district after June 28, 1938, or in any area added to an existing grazing district after that date, the priority period shall be the five years immediately preceding the date of the order establishing such district or effecting such addition, as the case may be * * *

(1) The dependency by use in no event shall exceed the average annual amount of forage that was customarily and properly utilized by the livestock operation during the priority period on that part of the public lands which, at the time of the issuance of the license or permit, is Federal range.

On December 11, 1946, Part 501, 43 CFR, was redesignated Part 161, 43 CFR, and section 501.2 (g) became section 161.2 (g) without any

change in text (11 F. R. 14496). The revision of 1942 remained in effect until the complete revision of the Federal Range Code which became effective on January 22, 1956 (43 CFR, 1956 Supp., Part 161).

On October 11, 1951, the Chief Counsel of the Bureau of Land Management stated in a memorandum to the Chief, Division of Range Management, that under the provisions of 43 CFR 161.2 (g) (1) the use made of the Federal range in *each* of the priority years must be included in determining the dependency by use of base properties.

The Federal Range Code of January 1956 now provides in section 161.2 (k) (3) as follows:

(3) The extent to which grazing licenses or permits will be granted on the basis of dependency by use of land shall be governed by the following:

(1) It shall not exceed the average annual amount of forage customarily and properly utilized by the livestock operation computed on the basis of any two consecutive years or any three years in which use was actually made during the priority period, *whichever is more favorable to the applicant*, on that part of the public land which, at the time of the issuance of the license or permit, is Federal range. [Italics supplied.]

The 1956 Code, therefore, re-established the formula originally incorporated in the 1938 Code for determining dependency by use.²

The appellant's application for grazing privileges which gave rise to this appeal was for the 1954 grazing season. Obviously, since the 1954 grazing season has long since passed, the case would be moot except for the fact that the issues involved are continuing in nature and involve an adjudication of the appellant's future grazing privileges on the Federal range. Since the result of the present appeal will be a determination of the appellant's future rights, the provisions of the 1956 Federal Range Code are applicable. Under the provisions of this Code, the applicant is entitled to select any 3 years, or any 2 best consecutive years, of livestock operation during the priority period as the basis for computation of his grazing privileges.

Therefore, it is concluded that the decision of the Director was in error in computing the dependency by use of the Original Base and that the priority of that base property should be recomputed in accordance with 43 CFR, 1956 Supp., 161.2 (k) (3).

Benson Base

The portion of the appellant's base property described as the Benson Base was acquired by Stephen A. Mahaffey sometime in 1940. At the time the property was called the Benson estate, although previously grazing licenses had been issued for the land from 1937 to 1939 in the name of L. H. Benson. The change was made in 1940.

² See memorandum dated September 28, 1955, from Director, Bureau of Land Management, to the Secretary, transmitting the 1956 revision of the range code for approval.

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L. H. Benson first filed an application for grazing privileges in February 1937. The application requested authority to graze 275 animal units on the Federal range from May 1 to November 1. The application stated that for 50 years the applicant had usually grazed 475 animal units on the public domain. The record shows that L. H. Benson was allowed a grazing license for 10 cattle and 75 horses from April 1 to June 1. Subsequent licenses were issued as follows:

1938—75 horses May 1 to July 1

1939—Non-use

1940—Non-use—Benson estate.

At the hearing, mortgage records for three of the priority years were introduced in evidence. These records showed that in 1931 Claude H. Benson, Levin H. Benson, and Henry W. Benson, co-partners doing business as C. H. Benson & Sons, executed a mortgage for 116 horses, 295 cattle, 100 calves, and 1,018 sheep, for a total of 614 animal units, not including calves. In March 1932, C. H. Benson & Sons mortgaged 96 horses, 223 cattle, and 815 sheep for a total of 482 animal units. In August 1933, a mortgage was executed by Nora E. Benson (widow of C. H. Benson), Levin H. Benson, H. W. Benson, and Nora E. Benson as administratrix, for 604 cattle and 113 horses for a total of 717 animal units. The mortgage records thus indicated that the Bensons together ran an average of approximately 600 animal units during three of the priority years.

In his decision, however, the hearing examiner concluded that the mortgage records submitted in evidence were not indicative of the livestock operations conducted by L. H. Benson.

* * * These mortgage records are a combined mortgage of Claude H. Benson, Levin H. Benson and Henry W. Benson. The range privileges to which the appellant succeeded, are those issued to L. H. Benson. * * * On the basis of the evidence presented there is no way of determining the number of the mortgaged livestock that were actually owned by L. H. Benson; nor does it appear, in view of the application and in the light of the testimony of L. H. Benson, that the number of livestock indicated in the original application is an accurate reflection of those run during the priority period. Benson testified that his livestock were taken to the National Forest in June and from June to November used the National Forest and the public domain concurrently. The inference to be drawn from the application and Benson's testimony is that all of his livestock ran a portion of the year upon the National Forest. Benson did not maintain in either his testimony or his application that his livestock used the Federal range from May until October except upon a percentage basis with the National Forest. It is therefore concluded that the record of the forest permit introduced in evidence reflects the number of livestock operated by Benson during the priority period.

On the basis of the record of forest permits issued to L. H. Benson, the hearing examiner concluded that L. H. Benson grazed 290 animal units in 1929, 225 in 1930, 225 in 1931, 180 in 1932, 125 in 1933, and

430 in 1934. The examiner also concluded that on the basis of testimony by Benson at the hearing and information submitted by the Forest Service, "the Benson livestock used the public domain from May 1 until they were permitted on the National Forest; that during the time they were on the National Forest they utilized public domain feed approximately 25 percent of the time and that after the period of use upon the National Forest they were brought back to the home ranch."

The examiner, therefore, concluded that L. H. Benson "customarily and properly utilized" the Federal range in the following amounts:

Period of use:	<i>Animal unit months</i>
July 1, 1929 to July 1, 1930-----	691
July 1, 1930 to July 1, 1931-----	656
July 1, 1931 to July 1, 1932-----	570
July 1, 1932 to July 1, 1933-----	337
July 1, 1933 to July 1, 1934-----	663

and held that the average annual feed was 583 AUMS. This figure was determined by totaling the computed AUMS of feed consumed during each of the 5 priority years from July through June, and dividing by 5.

The Director's decision approved as proper the conclusions of the examiner that the mortgage records were not indicative of the livestock operations of L. H. Benson, and also the method of computation in arriving at the priority of the Benson base property. However, the Director corrected a miscalculation in some of the figures used by the examiner and determined that the total priority should be 540 AUMS.

In its appeal to the Secretary, the appellant contends that the Director's decision appears to be predicated entirely upon the Forest Service records, but that only a part of those records were utilized. The appellant states that the Forest Service records show the actual forest use of L. H. Benson and C. H. Benson to be as follows, and that "There is no question that they are not from the same base property":

July 22, 1957

L. H. Benson Forest Service Permits

Year		Period of use
1929	40 horses.....	June 1-Oct. 31.
1930	25 horses.....	June 1-Oct. 31.
	1,000 sheep.....	July 1-Oct. 31.
1931	25 horses.....	June 1-Oct. 31.
	1,000 sheep.....	July 1-Oct. 31.
1932	20 horses.....	June 1-Oct. 31.
	800 sheep.....	July 1-Oct. 31.
1933	25 horses.....	June 1-Oct. 31.
	100 cattle.....	June 1-Oct. 31.
1934	55 horses.....	June 1-Oct. 31.
	150 cattle.....	June 1-Oct. 31.

C. H. Benson Forest Service Permits

Year		Period of use
1929	50 horses.....	June 1-Oct. 31.
	200 cattle.....	June 1-Oct. 31.
1930	25 horses.....	June 1-Oct. 31.
	200 cattle.....	June 1-Oct. 31.
1931	25 horses.....	June 1-Oct. 31.
	200 cattle.....	June 1-Oct. 31.
1932	25 horses.....	June 1-Oct. 31.
	180 cattle.....	June 1-Oct. 31.
1933	25 horses.....	June 1-Oct. 31.
	138 cattle.....	June 1-Oct. 31.
1934	25 horses.....	June 1-Oct. 31.
	200 cattle.....	June 1-Oct. 31.

The appellant contends that the combined use of the National Forest lands by L. H. Benson and C. H. Benson resulted in the following numbers of livestock during the priority years:

Year	Sheep	Cattle	Horses	AUS
1929.....		200	90	290
1930.....	1,000	200	50	450
1931.....	1,000	200	50	450
1932.....	800	180	45	385
1933.....		238	50	288
1934.....		350	80	450

The two best consecutive years are 1930 and 1931 showing an average use of 1,000 sheep, 200 cattle, and 50 horses. The appellant contends that the Benson stock ran on the public domain from turn-out season to gathering time; that turn-out time for sheep would be from April 15 to May 1, and that after the sheep came off the forest they would be on the public domain sometimes as late as December 15 or

January 1; that turn-out time for cattle was about May 1 and gathering time was any time in November, depending on the weather; and that turn-out time for horses was about May 1 and gathering time about the middle of December.

The appellant concludes on the basis of the above figures that the Benson Base is entitled to the following AUMs:

200 cattle----	May 1-June 1--	100% Federal range use-----	200 AUMS
200 cattle----	June 1-Oct. 31--	25% Federal range use-----	250 AUMS
200 cattle----	Oct. 31-Dec. 1--	100% Federal range use-----	200 AUMS
1,000 sheep--	May 1-July 1--	100% Federal range use-----	400 AUMS
1,000 sheep--	July 1-Oct. 31--	25% Federal range use-----	200 AUMS
1,000 sheep--	Oct. 31-Dec. 1--	100% Federal range use-----	200 AUMS
50 horses----	May 1-June 1--	100% Federal range use-----	50 AUMS
50 horses----	June 1-Oct. 31--	25% Federal range use-----	62 AUMS
50 horses----	Oct. 31-Dec. 1--	100% Federal range use-----	50 AUMS
Total-----			1,612 AUMS

In its appeal to the Director, the appellant pointed out that from 1922 until his death in 1933 Claude H. Benson operated a ranch known as the Claude Benson ranch. Simultaneously, Claude H. Benson and his sons, L. H. Benson and Henry Benson, operated a partnership known as Claude H. Benson and Sons. This stock farm operation operated from the Claude Benson Ranch and from the Henry Benson Ranch which was created by land deeded to Henry Benson in 1922 from his father and mother.

After the death of Claude Benson the partnership operation continued until 1935 when the Henry Benson Ranch passed to the Federal Land Bank. Thereafter, L. H. Benson ran the Claude Benson Ranch until it was sold to Stephen A. Mahaffey, Sr., in 1940. In view of this history the appellant contended that on the basis of the mortgage records, the Forest Service records, the so-called "Booker breakdown" (an analysis of the Benson estate prepared in October 1941, by Edward Booker, an employee of the Grazing Service, which gave the combined Benson bases total qualifications of 650 animal units), the original application of L. H. Benson and the testimony of L. H. Benson and Floyd Whittaker, the Benson base was reasonably entitled to the following animal unit months:

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204 cattle-----	May 1-June 1-----	100%	204 AUMS
204 cattle-----	June 1-October 1-----	25%	255 AUMS
204 cattle-----	October 1-December 1--	100%	408 AUMS
1,113 sheep-----	May 1-June 1-----	100%	222 AUMS
1,113 sheep-----	June 1-October 1-----	25%	278 AUMS
1,113 sheep-----	October 1-December 1--	100%	444 AUMS
25 horses-----	May 1-June 1-----	100%	25 AUMS
25 horses-----	June 1-October 1-----	25%	31 AUMS
25 horses-----	October 1-December 1--	100%	50 AUMS
78 horses-----	May 1-December 1-----	100%	624 AUMS
			<hr/>
25% to Whittaker ³ -----			2,541
			635 AUMS
<hr/>			<hr/>
75% to appellant-----			1,906 AUMS

³ In 1938 Floyd Whittaker purchased the Henry Benson ranch from the Federal Land Bank. According to Whittaker's testimony an oral agreement was reached whereby Whittaker received one quarter of the range rights of the total Benson set-up and Stephen Mahaffey received three quarters of the rights (Tr. 71, 75).

The Director's decision did not specifically discuss this contention of the appellant.

It is obvious from this recital concerning the Benson Base that the computation of the priority of this property has been shrouded in considerable confusion. The appellant has presented two different computations which vary considerably in result. Both computations differ from those of the Director and the examiner. With respect to the latter's computations, both excluded any consideration of the forest permits issued to C. H. Benson during the priority period.

The hearing examiner's decision simply stated that the appellant succeeded to the range rights allotted to L. H. Benson and whether L. H. Benson operated as part of a partnership or not was of no importance. However, the record shows that the appellant acquired the Benson estate properties and therefore is entitled to all of the privileges attached to that property regardless of in whose name they were allotted. It is the base property itself to which the dependency by use or priority attaches and not the individual or group of individuals who own the property. The Director's decision merely said that the examiner's method of computation was proper.

The appellant's contention that the Benson base property originally consisted of the Claude Benson Ranch and the Henry Benson Ranch and that the appellant purchased the Claude Benson Ranch lands appears to be confirmed several times in the record, both in the case files and in the transcript of the hearing (Tr. 30, 45-46). However, the only testimony offered by the appellant regarding the Benson operations during the priority years was that of L. H. Benson. Mr. Benson testified concerning the period of use of the forest lands and the Federal range. He did not testify about the operation of the Claude Benson ranch or as to any Forest Service permits issued to Claude H. Benson. The only evidence in the record concerning these permits appears to be the appellant's Exhibit C, which is a history of

the L. H. Benson and C. H. Benson grazing permits on the Salmon National Forest apparently prepared by the Acting Supervisor of the Salmon National Forest in December 1954. The document is only a purported summary showing the year, season of use, number of cattle, sheep, and horses for which permits were allowed, and the actual use of the allowed permits. However, there is no conflicting evidence in the record casting doubt on the authenticity of this document or the information contained in it.

As previously mentioned, the decisions of the examiner and the Director rely entirely on the record of the Forest Service grazing permits issued to L. H. Benson as evidence of the livestock operations on the Benson base during the priority period. The appellant has shown on appeal that the Director did not utilize all the Forest Service permits in reaching his determination. The chattel mortgage records, which the Director held were not indicative of the actual livestock operations, nevertheless show that the Benson operation did possess sufficient livestock to utilize the combined allotment made to L. H. Benson and C. H. Benson. Therefore, if there was livestock owned by Claude Benson during the priority period which utilized the feed on the Federal range from the Benson base property, they should be included in the computation of the priority of the Benson base land now owned by the appellant.

In the unsatisfactory state of the record with regard to the determination of the priority to be assigned to the Benson Base, I am unable to approve or disapprove the determination made by the Director. It seems to be that the matter should be studied further. This study should include a determination of the relationship between the forest permits issued to C. H. Benson and those issued to L. H. Benson, the ownership of the sheep, cattle, and horses on the basis of which the permits were issued and how and when the sheep, cattle, and horses utilized the Federal range. It seems possible that the Forest Service records may furnish some information on these points. Accordingly, the case will be remanded for this purpose.

As has been mentioned in regard to the computation of the priority of the Original Base, the Director erred in computing the priority on the basis of the average use made of the Federal range for each year of the priority period rather than selecting the two best consecutive years, or any three years. The record shows that the same error was made in computing the priority of the Benson Base property. Therefore, even if the appellant's contention regarding the Claude H. Benson forest permits is ultimately disallowed, the priority for the Benson base should be computed again under the provisions of section 161.2 (k) (3).

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Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the case is remanded for further consideration and for a redetermination of the priorities of the Original Base and of the Benson Base in accordance with this decision.

EDMUND T. FRITZ,
Deputy Solicitor.

**EFFECT OF SECTION 4 OF THE ACT OF JULY 23, 1955
(69 STAT. 368; 30 U. S. C. SEC. 612) ON MILL-SITE LOCATIONS—
TIMBER ON MILL SITES**

Mining Claims: Mill Sites—Timber Sales and Disposals

Section 4 of the act of July 23, 1955 (69 Stat. 368; 30 U. S. C. sec. 612), is applicable to valid mill-site locations made after the act. The restrictions and limitations of section 4 are applicable to valid mill-site locations made prior to the act only if in accordance with section 6 thereof the owners waive and relinquish all rights in conflict with those restrictions and limitations. The owner of a valid mill-site location may cut and remove the timber on the claim for the purpose of constructing thereon a mill, reduction works, tramway, or other accessories required in the development of his mineral interests but he may not cut the timber for the purpose of selling it.

M-36451

JULY 22, 1957.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

This is in response to your memorandum of May 28 asking the following questions:

(1) Are mill sites, located either before or after the enactment of Public Law 167, subject to the restrictions and surface management provisions provided by Public Law 167?

(2) Does the locator of a valid mill site claim have the right to cut and use timber on a mill site for the construction of a mill or other buildings on the mill site in a similar manner as provided for the use of timber on a valid lode or placer claim?

Although section 4 of Public Law 167 [69 Stat. 368] is silent as to mill sites as such, I think that there is no doubt that it applies to mill-site locations. This conclusion is supported by the words "any mining claim hereafter located under the mining laws of the United States" in the second paragraph of section 4 and the words "Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or *for the construction of buildings or structures in connection therewith*" (Italics supplied) in the third paragraph of that section. The De-

partment has held that a mill site is a "location under the mining laws of the United States," made substantially the same as in the case of a mineral claim under those laws.¹ Also, the Department has held with respect to the act of June 4, 1897 (30 Stat. 36; 16 U. S. C. sec. 478), which is silent as to mill-site locations and which permits mining locations in national forests, that it applies to mill-site locations as the mill-site provision of section 2337 Revised Statutes (30 U. S. C. sec. 42) "is an essential part of the present system of mining laws."²

As section 4 of Public Law 167 refers only to claims "hereafter located" it is inapplicable to *valid* locations made before the act and its restrictions do not apply to those claims unless and until, pursuant to section 6 of the act, the owners waive and relinquish all rights in conflict with the limitations and restrictions specified in the section 4.

With respect to question No. 2:

A letter dated March 22, 1883, from the then Commissioner of the General Land Office, addressed to A. B. Page (1 L. D. 614), states correctly the rule of law concerning rights of an owner of a mill-site location made prior to the 1955 act with respect to the timber growing on the claim. The rule is that the owner of a valid mill-site location may cut and remove the timber on the claim for the purpose of constructing thereon a mill, reduction works, tramway, or other accessories required in the development of his mineral interests, but he may not cut the timber for the purpose of selling it. Of course, a mill-site claim cannot be located for the purpose of acquiring the timber thereon;³ and mill-site locations must be supported by actual use and occupancy of the claim for mill-site purposes, anticipated future use not being sufficient therefor.⁴

ELMER F. BENNETT,
Solicitor.

ESTATE OF BERNARD WHATKAN
COEUR D'ALENE ALLOTTEE NO. 415

IA-796

Decided July 31, 1957

Indian Lands: Descent and Distribution: Wills

An appeal from a decision of an Examiner of Inheritance which denied a petition for rehearing, after a determination of heirs and approval of a will, may be withdrawn by the appellants in aid of a settlement whereby

¹ *Eagle Peak Copper Mining Company*, 54 I. D. 251, 253, 255 (1933).

² *James W. Nicol*, 44 L. D. 197, 198 (1915).

³ *Two Sisters Lode and Mill Site*, 7 L. D. 557 (1888).

⁴ Solicitor's decisions of April 25, 1950, and August 6, 1951, A-25808, unreported; *United States v. Langmade and Mistler*, 52 L. D. 700, 703 (1929); *Eagle Peak Copper Mining Company*, 54 I. D. 251, 255 (1933); *Arthur Crowley et al.*, 46 L. D. 178 (1917).

July 31, 1957

distribution of the estate is to be made in a manner other than by the terms of the will.

APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS

Mrs. Annie Lowley Whatkan, Mrs. Marie W. Williams and Mrs. Lucy W. Finley, through their attorneys, Robert McFadden and Richard L. McFadden, have appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance, dated February 14, 1956, denying their petition for a rehearing in the matter of the Estate of Bernard Whatkan, deceased Coeur d'Alene Allottee No. 415, whose last will and testament, dated June 4, 1943, was approved by an Examiner of Inheritance on November 29, 1955.

The testator died on April 8, 1954, at the age of 66, leaving an estate appraised at \$52,348.45. He left surviving as his heirs at law, Annie Lowley Whatkan, wife; Marie Whatkan Williams, daughter; Lucy Whatkan Finley, daughter; and a son, George Whatkan, also known as George Daniels. In the absence of a valid will, each of the heirs would have inherited an undivided interest in the estate. By the terms of the approved will, the testator specifically devised his own allotment described as NE/4 sec. 19, T. 47 N., R. 5 W., B. M., to his son, George Daniels, with the proviso that:

If and when this land passes into the name of George Daniels, and he should die before either or both of my daughters, Mary and Lucy, then this land is to pass to my two daughters or their children.

By the residuary clause of the will, all of the rest and residue of the estate, real, personal, and mixed, was devised to his son, George Daniels. The testator inherited considerable property subsequent to the making of his will. Also, subsequent to the making of his will, the testator conveyed to his son, George Daniels, 92½ acres of his allotment, leaving 67½ acres remaining, which passed by the specific devise to the said son.

It appears that after the death of the testator, but before the approval of the will by the Examiner of Inheritance, the heirs had verbally agreed to a settlement of the estate whereby the assets would be distributed as intestate property rather than by the terms of the will. This agreement was not referred to at the hearing to approve the will, and in order to avoid distribution and have time to effect the settlement, a timely petition for rehearing was filed by appellants, which was denied by the Examiner of Inheritance, whereupon a timely appeal was then filed. Subsequent to the filing of the appeal, George Daniels signed an agreement as to the terms of a settlement which he later repudiated but has now again entered into a written agreement whereby he will retain as his own the allotment of the

testator specifically devised to him, and cause the remainder of the estate to be distributed as intestate property.

A formal withdrawal of the appeal dated June 12, 1957, signed by the attorneys on behalf of the appellants, Marie W. Williams and Lucy W. Finley, has been submitted, together with the agreement for settlement signed by all of the heirs. The request for the withdrawal of the appeal will be granted upon the performance of the following conditions:

1. The delivery and approval of trust or restricted deeds whereby Marie Whatkan Williams and Lucy Whatkan Finley quitclaim unto George Whatkan, also known as George Daniels, any and all interest in the testator's allotment No. 415 described as NE/4 sec. 19, T. 47 N., R. 5 W., B. M.

2. The delivery and approval of trust or restricted deeds whereby George Whatkan, also known as George Daniels, shall convey $\frac{1}{3}$ undivided interest to his mother, Annie Lowley Whatkan, and $\frac{2}{9}$ undivided interest to each of his sisters, Marie Whatkan Williams and Lucy Whatkan Finley, in Coeur d'Alene Allotments Nos. 133, 413 and 414.

3. The appellant, Annie Lowley Whatkan, shall join in the written withdrawal of the appeal.

4. Claims for the appellants' attorney fees shall be determined by the Examiner of Inheritance and charged against the interests of the appellants in accordance with 25 CFR 81.26.

Therefore, this matter is suspended until the settlement of the parties hereto is consummated, without prejudice to the rights of appellants to reinstate their appeal, should a failure of the settlement become apparent.

Upon advice from the Examiner of Inheritance that the settlement has been properly completed, the formal withdrawal of the appeals will be accepted and thereupon, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised; 17 F. R. 6793), the order of the Examiner of Inheritance denying the petition for rehearing will be affirmed and the appeal dismissed, and the Superintendent of the Northern Idaho Agency, will be authorized to make distribution of the decedent's estate in accordance with orders of the Examiner of Inheritance.

ROBERT P. DWYER,
Acting Solicitor.

*July 22, 1957***CONSTRUCTION OF A CONTRACT FOR THE SALE OF INDIAN TIMBER****Indian Lands: Timber—Indians: Contracts**

Where a contract for the sale of Indian timber, pursuant to either sections 7 or 8 of the act of June 25, 1910, 36 Stat. 857, 25 U. S. C. secs. 406 or 407, is supported by adequate consideration, no new consideration is required to support a change in price or ratio pursuant to a redetermination of price or ratio clause contained in the contract. Consideration adequate for the original contract is sufficient to support several distinct stipulations by either party to do, or refrain from doing, further acts.

Indian Lands: Timber—Indians: Contracts—Secretary of the Interior

Where a contract for the sale of Indian timber authorizes the Secretary to redetermine stumpage prices upon a finding of changed conditions, the Secretary has broad discretion to consider those factors and use those tests and methods of valuation which a capable and prudent businessman would use.

Indians: Contracts—Indian Lands: Timber

Contracts for the sale of timber on any Indian allotment or on unallotted tribal lands pursuant to sections 7 and 8 of the act of June 25, 1910, 36 Stat. 857, 25 U. S. C. secs. 406 and 407, are not public contracts so as to be subject to all the special laws pertaining to such contracts.

M-36461**JULY 22, 1957.*****TO THE COMMISSIONER OF INDIAN AFFAIRS.**

Your office has requested an opinion as to the factors which may be taken into consideration by the Secretary of the Interior and his staff in establishing new percentage ratios between stumpage rates and the Puget Sound—Grays Harbor log prices under paragraph 10 of contract No. 1-101-Ind-1766 for the sale of Indian timber on the Taholah Logging Unit, approved May 12, 1950.

A question has been raised as to the legality of the Secretary's handling of an interest factor on money advanced to the Indian sellers prior to the harvesting of their timber by the purchaser. The questioned action was taken in the process of his redetermination of the price and the establishment of a ratio for automatic quarterly readjustments thereafter pursuant to paragraph 10 of the contract. At the risk of over-simplification, and confining our discussion to one type of stumpage, a reading of the subject contract shows that the parties agreed upon a price of \$9.75 for Western red cedar for the quarterly period ending March 31, 1950 (par. 6). It was also agreed that the published average price for Western red cedar logs for the same period was \$48.52 per unit (par. 7). It was the purpose of the

*Not released for publication in time for inclusion chronologically.

contract that the original price for Western red cedar stumpage would be changed each quarter so as to retain the same relationship to the published prices for logs no matter how much the latter changed quarterly. This was set out as a "ratio," expressing mathematically the relationship of the agreed price of stumpage to the published price of logs, which ratio as of the date of the original period was 22 percent.

The parties further agreed—the parties being the Indians and the lumber company—that if the Secretary of the Interior should find upon review that the "character of the operation, changes in marketing conditions or technological developments" had altered the situation to such extent as to impress the Secretary with the desirability of changing the ratio, he should proceed to establish a new ratio upon 30 days' notice to the lumber company.

The exact language of paragraph 10 of the subject contract reads as follows:

THE SECRETARY OF THE INTERIOR OR HIS DULY AUTHORIZED REPRESENTATIVE MAY, upon his own initiative, or upon submission by the Purchaser of evidence satisfactory to the Secretary or such representative, review the stumpage rates established by the procedure set forth in Sections 6 to 9 inclusive. If, as a result of such review, the Secretary or such representative finds that the character of the operation, changes in marketing conditions, or technological developments, have altered the situation to such an extent that a change in the existing ratios between stumpage rates and the Grays Harbor-Puget Sound log prices appears warranted, he shall give thirty days notice to the Purchaser of his intention to establish new percentage ratios between stumpage rates and the Grays Harbor-Puget Sound log prices during which time the Purchaser may consult with the Secretary or such representative; PROVIDED that the requirements of notice in this Section shall be satisfied when the new ratios established under its authority are made effective upon the first day of the quarterly period which is not less than thirty days following notice by the Secretary or such representative to the Purchaser that he intends to proceed under the authority of this Section to change such ratios. The ratio, however, for any species of sawtimber shall not be changed oftener than once in any calendar year.

Paragraph 10 of the contract authorizes the Secretary or his representative to review the character of the operation, marketing conditions or the technological status of the industry to determine whether changes of such an extent have taken place as to warrant the setting of a new percentage ratio between the value of the stumpage and the published Grays Harbor-Puget Sound log prices. There arises the question of what cost items in the spread between the value of the stumpage and log prices the Secretary may take into consideration in determining a new ratio. Is the Secretary limited to factors related to changes in the character of the operation, marketing conditions or technological developments? We believe not.

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The contractual plan for redetermination of price contemplates a two-step procedure. First, the Secretary must make a finding that significant changes having to do with the character of the operation, marketing conditions or technological developments have taken place. Here, without argument, he is limited to the consideration of the events germane to these stated classes. Once the Secretary has satisfied himself that changes of such type and of sufficient magnitude have occurred, he is authorized to take the second step, namely, to redetermine a new ratio between the fair value of the stumpage and the published price of logs. In carrying out this responsibility, the Secretary is acting as the freely chosen arbiter of both parties to the contract—one of whom is the buyer of the stumpage and the other the seller.

There seems no doubt that the Secretary, in the exercise of reasonable discretion, can take the interest factor into account in determining whether changes in the specified conditions "have altered the situation to such an extent that a change in the existing ratios * * * appears warranted * * *." Thus he can refuse altogether to establish new ratios because of an interest factor or any other reasonable consideration bearing on the fairness of the existing ratios to the contracting parties. To construe the Secretary's authority under section 10 to permit him discretion to refuse any relief whatever on unspecified but reasonable grounds, and then to construe the remainder of section 10 so narrowly as to exclude these same grounds from consideration in fixing the degree of relief, can only have harsh and unreasonable consequences. The law favors an interpretation which is fair and reasonable to one which leads to harsh or unreasonable results. *Restatement, Contracts*, sec. 236 (a). Written contracts are to be interpreted as a whole. *Supra*, sec. 235 (c).

We see no reason to believe that the Secretary may not use any tests of value which a reasonable man, acquainted with the marketing of stumpage, could be expected to use under the circumstances. Of course, his actions may not be arbitrary or capricious. He exercises an informed discretion. The law is not unfamiliar with the practice of setting fair values. (Cf. *In re Oullette*, 98 F. Supp. 941 (1951).) The Secretary in his redetermination of the price ratios will be here guided by those tests and methods of valuation which a capable and prudent businessman would use. The Secretary may approach the pricing problem exactly as his office did in determining the original ratio or he may employ more recent methods of appraisal and pricing. He may determine the ratio and from it determine the price for the quarter then involved or he may determine the then fair price and fix the ratio. Either way the price will continue to change as the ratio changes. There is no reason why

he need repeat any errors of computation which may have crept into the original negotiations or fail to take advantage of later information or improvements in pricing techniques. This construction of the contract permits the Secretary to take into consideration the cost of interest involved in making payments in advance of cutting to the sellers of the stumpage whether this item of cost was reflected in the original price or not.

A further question has been raised as to whether there need be new consideration passing between the parties in connection with the use of a cost item not used in the original pricing. We know of no legal theory which would require a new consideration to support such a change in the pricing formula used in the redetermination of price in this type of contract. Of course the contract itself had to be supported by consideration. The contract contains mutual promises which bring it within the general rule "that a promise by one party is a sufficient consideration for a promise by the adverse party." (Cf. 12 Am. Jur., Contracts, § 113.) It is also clear that the consideration passing between the parties and supporting the original contract is sufficient to support their agreement to, in effect, abide by the redetermination of a new ratio which may result in advantages or disadvantages to either side. The general principle is well understood: "The single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do, or refrain from doing, certain things, and it is unnecessary to repeat in every paragraph of the contract that such stipulations are entered into for the consideration once expressed." (12 Am. Jur., Contracts, § 119.)

It is therefore our opinion that the Secretary legally took into consideration interest on funds required by the contract to be advanced by the purchaser to the seller. In fact it is arguable that a failure to take this interest factor into account would have given the purchaser grounds to complain of arbitrary and capricious action by the Secretary in his role of "arbiter" of the redetermined ratio. This is true whether these contracts are considered "in the nature of public contracts" or purely as private contracts between the Indians as sellers and the lumber company as purchasers subject to a statutory approval by the Secretary in his role as trustee of the economic resources of the Indians involved.

It is our further opinion that as a matter of law these contracts are not public contracts so as to be subject to the special laws pertaining to such contracts. Contracts other than public contracts are governed by the general law of contracts as modified by particular statutory requirements. The Supreme Court and other Federal courts have consistently held that Indian timber sales contracts

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under 25 U. S. C. secs. 406 and 407 are not "public contracts." The leading case is *United States v. Algoma Lumber Company*, 305 U. S. 415 (1939). On the basis of the *Algoma* case, we conclude that the United States is technically not a "party" to this type of contract and that a contract to which the United States is not a party is not a "public contract." The principle of the *Algoma* case was followed by the Circuit Court of Appeals, Eighth Circuit, in *Farm Security Administration v. Herren*, 165 F. 2d 554 (1948), and again in *Waterman S. S. Corporation v. Land*, 151 F. 2d 292 (1945), reversed on other grounds, 327 U. S. 540. The Attorney General's office by letter to the Secretary of the Interior dated April 17, 1912, ruled that contracts for the sale of timber under authority of section 7 of the act of June 25, 1910, *supra*, "are solely for the benefit of the Indian and are in no wise contracts 'on behalf of the Government' * * *." This ruling is understood to mean that these timber contracts are not public contracts.

Whether or not the subject contract is in the nature of a public contract, we believe that in the establishment of new percentage ratios between stumpage rates and the Grays Harbor-Puget Sound log prices no additional consideration need be found to pass between the parties to support the readjustment of price and ratio, for the contract as executed was supported by adequate consideration. The sole responsibility of the Secretary is to fulfill his contractual role as "arbiter" of the new ratio in accordance with well-established rules of law governing similar contracts between private parties and those principles of economics which would guide an informed businessman in similar circumstances.

It is of course manifest that this opinion relates only to the legal authority for the actions taken and does not undertake to state the technical and policy considerations which entered into the administrative decisions concerned.

ELMER F. BENNETT, *Solicitor*.

CERTAIN QUESTIONS ARISING AS THE RESULT OF THE EXTENSION OF THE SEGREGATED LEASE OF ANY UNDEVELOPED LANDS RESULTING FROM A PARTIAL ASSIGNMENT OF A LEASE WHICH IS IN ITS EXTENDED TERM BECAUSE OF ANY PROVISIONS OF THE MINERAL LEASING ACT PURSUANT TO SECTION 30a THEREOF (30 U. S. C., 1952 ED., SUPP. IV, SEC. 187a)

Oil and Gas Leases: Extensions—Oil and Gas Leases: Rentals

Where an oil and gas lease is extended pursuant to the last sentence in section 30a of the Mineral Leasing Act, as amended (68 Stat. 585; 30 U. S. C., 1952 ed., Supp. IV, sec. 187a), the extension runs from the next succeeding

anniversary date of the lease for such part of 2 years as remain after deducting the period, if any, between the effective date of the (partial) assignment and such anniversary date and there is no change in the anniversary date.

Oil and Gas Leases: Extensions—Oil and Gas Leases: Rentals

If the resulting extension is for less than a full year or if after it has run for a full year it is due to continue for less than another full year, the annual rental is to be prorated in the same proportion that the remaining fractional year of the extended term bears to a full year.

Oil and Gas Leases: Extensions—Oil and Gas Leases: Rentals

The procedure with respect to the approval of assignments where the term of the assigned lease is extended by operation of law even after the lease term in which they were filed has expired is the same as it has always been. An assignment may be approved in such circumstances and the approval will relate back to the effective date of the assignment as fixed in section 30a of the Mineral Leasing Act.

Oil and Gas Leases: Extensions—Oil and Gas Leases: Rentals

Any lease issued under any provision of the Mineral Leasing Act which is in its extended term under any provision of that act is subject to partial assignment and the resulting lease or leases of any undeveloped land is entitled to the extension provided for in the law. The extension privilege does not apply to *renewals* of leases pursuant to section 17 of the act, as it read prior to its amendment August 21, 1935.

M-36464

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TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

In your memorandum of June 12, you ask what is the proper rental charge on a lease extended pursuant to section 30a of the Mineral Leasing Act where the period following the last anniversary date of the lease as extended is less than 1 year.

The State Supervisor, Denver, Colorado, has asked this and certain additional questions of the Regional Solicitor, Denver, Colorado, and has received answers as follows:

(1) As to prorating rentals:

[the rental] would be 50 cents per acre per year [on a nonproductive lease not on a known producing geological structure] and for the year in which the lease does not run for the full year the rentals will be prorated to reflect rentals due for that portion of the year during which the lease is to be effective.

(2) The Regional Solicitor also stated that the approval of such an assignment would not change the anniversary date of the lease.

I am in full agreement with these conclusions of the Regional Solicitor. The provision for lease continuance for 2 years is intended to guarantee the assignee and, it may be the holder of the retained portion, a minimum period of 2 years in which to develop the lease. That purpose is evident elsewhere in the law. It is reflected for example in the provision of which this is an amendment and in the

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1946 amendatory act as applied to leases eliminated from a unit area. No purpose to change the anniversary date of the lease is evident. The general rule (so far as I know it has never been departed from) is to consider in such cases, and there are several counterparts including those resulting from the operation of section 39 of the act (30 U. S. C. sec. 209) and section 6 of the Outer Continental Shelf Lands Act (43 U. S. C., 1952 ed., Supp. IV, sec. 1335), that the anniversary date does not change, but one period will be less than one year and the rentals will be prorated for that period. The section 6 Outer Continental Shelf Lands Act cases are so treated pursuant to Comptroller General's Opinion B-126352 of March 21, 1956. As stated in that opinion, any other rule would result unfairly as between lessees who held for different periods of time. I am informed that in the section 39 cases the fractional year's rental was paid for the *first* period of the extension instead of the last, but such payments followed a suspension of the lease, including suspension of the rental and the lease went from a rent free status to a rental status within a lease year. Here unless the assignment is made and filed on or near the last day of the prior extension rental, if the lease is in a rental status, it will already have been paid for sometime in advance and no rental will be due until the next anniversary date. If the parent lease is not in a rental status, the assigned portion takes the same status until the next rental due date, except that where rentals are suspended if the suspension is lifted before the next anniversary date both portions of the original lease would fall into a rental paying status immediately.

The Regional Solicitor suggests the question whether such an assignment must be approved prior to the expiration of the prior extension to make the further extension applicable. It is the uniform rule that such approvals may have a retroactive effect. In fact, the law itself so implies (30 U. S. C. sec. 187a). The same rule has been applied in the issuance of coal and some other mineral leases which are customarily back-dated to the date on which the application was filed. So also with respect to applications for suspension of operations and production, the waiver of minimum production requirements of leases and other requests for relief.

Another question suggested by the Regional Solicitor is as to what type of leases and extensions this provision of law applies. It is part of a section which applies generally to all oil and gas leases subject to the act. The provision which it replaced by its very terms was limited to one type of extension "because of production" and necessarily excluded leases for which the law provided no extension because of production. The new provision, however, is not so limited in its scope. It applies to all leases issued and thereafter extended

under any provision of the act where a partial assignment of undeveloped land is made. It applies to 20-year leases issued under section 14 or section 17 as it existed prior to its amendment in 1935, or renewals of such leases only if the 20-year term or the 10-year term has been extended under some provision of the act. It applies *only* to *extended* leases. It *does not* apply to *renewals* of leases.

CHARLES M. SOLLER,
Associate Solicitor.

Approved: August 22, 1957.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF BARNARD-CURTISS COMPANY

IBCA-82

Decided August 9, 1957

Contracts: Interpretation—Contracts: Additional Compensation—Contracts: Changes and Extras—Contracts: Changed Conditions

A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by floodwaters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be allowed under the "changed conditions" article of the contract.

Contracts: Performance—Contracts: Additional Compensation

In order to permit inspection of damage caused by a flood resulting from an unusually heavy rainstorm a contractor could be required to dewater a headworks structure inundated by the floodwaters when the contract provided that the contractor was to provide without cost to the Government reasonable facilities for the inspection of the work.

Contracts: Performance—Contracts: Acts of Government

A contractor engaged in rehabilitating an existing irrigation system should expect that some maintenance work and even minor construction work will be performed during the construction period of the contract, and the fact that such work was performed does not excuse the contractor from repairing damage caused by floodwaters resulting from an unusually heavy rainstorm. This is especially so when the contractor has failed to show that there was a causal connection between such work and the damage to the contractor's work.

Contracts: Performance—Contracts: Specifications—Contracts: Additional Compensation

The question whether a contractor who was engaged in the rehabilitation of an existing irrigation system may be required to repair storm damage to the

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work outside the pay or neat lines of the contract depends in large part upon whether the contractor was negligent in its operations prior to the occurrence of the storm. Although under the terms of the contract the contractor was required to repair the storm damage irrespective of fault on its part, this obligation would be limited to the restoration of the work it had undertaken under the contract. On the other hand, if the contractor were guilty of negligence in the conduct of its operations prior to the storm, it would be obligated to repair any damage attributable to its negligence, whether within or without the pay or neat lines. However, even though the contractor were not negligent, the scope of its obligation to repair storm damage would not be so narrow that it could not be required to do any work that was outside the pay or neat lines, nor so wide that it could be required to restore any property of the Government that may have been damaged by the storm. Thus, the contractor, who was required to make an opening through an embankment, was not obligated to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work.

Contracts: Generally—Contracts: Performance—Contracts: Substantial Evidence—Contracts: Subcontractors and Suppliers

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden of proving that the contractor was negligent rests on the Government in such circumstances, and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence when, having completed a wasteway structure, he failed to place the backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.

BOARD OF CONTRACT APPEALS

Barnard-Curtiss Company has appealed from the findings of fact and decision of the contracting officer dated July 3, 1956, denying its six claims for additional compensation, originally totaling \$42,226.79, arising out of its performance of Contract No. 14-06-D-715 with the Bureau of Reclamation.

The contract, which was dated November 27, 1953, and was on U. S. Standard Form No. 23 (Revised April 3, 1942), provided for earthwork and structures for the rehabilitation of the Vermejo Diversion

Dam, the Vermejo Canal, and the Eagle Tail Canal on the Vermejo Project, New Mexico. The total contract price was \$332,654.

A hearing was held on the appeal on March 7 and 8, 1957, at Denver, Colorado, before the undersigned, a member of the Board.

Notice to proceed with the work was received by the contractor on December 12, 1953. As, under paragraph 6 of the specifications the work was to be completed within 550 calendar days of receipt of notice to proceed, the work should have been completed on June 15, 1955. By findings of fact dated June 28, 1955, the time for completion was extended, however, 77 calendar days, or until August 31, 1955. The work was actually not completed and accepted until October 22, 1955, but no question of liquidated damages for delay is involved in the present proceeding.¹

The contractor's claims were summarized by the contracting officer in his findings in tabular form, as follows:

Claim item No.	Structure involved	Amount claimed	Amount allowed
I.	Eagle Tail headworks	\$8,574.00	\$719.55
II.	Willow Creek wasteway	21,597.71	None
III.	Curtis Creek wasteway	7,815.95	None
IV.	Crow Creek Siphon	347.87	None
V.	Eagle Tail canal	630.00	None
VI.	Vermejo canal	3,261.26	None

It appears that a single event was the origin of the first four of the contractor's claims. A heavy rainstorm occurred at the site of the work and in drainage areas upstream therefrom at the time the work under the contract was being performed. The rainstorm, which began on May 17 and continued through May 20, 1955, produced a total precipitation at the site of the work of 7.02 inches, which was 50 per cent of the average annual precipitation, and approximately 400 per cent of the average precipitation in May in the locality of the work. The floods resulting from the storm inundated and damaged much of the contractor's work. The contracting officer found that the damage varied from only minor damage at Crow Creek Siphon to almost complete destruction at Willow Creek Wasteway. The contractor repaired the damage but did so under protest, claiming that the protective works which it had constructed with the approval of the Government inspectors, would have been sufficient except for the wholly unexpected rainstorm, and that it was, therefore, entitled to additional compensation under article 4 of the contract which provided for equitable adjustments in case the contractor encountered

¹ Department Counsel indicated at the hearing that a further extension of time had been granted to the contractor, and that no liquidated damages would be assessed.

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"changed conditions."² The contracting officer rejected, however, the contractor's contentions, and in his decision he held that the contractor was bound to bear the costs of the repairs in view of the provisions of article 10 of the contract, which provided that the contractor was to be responsible for work performed "until completion and final acceptance" and that upon completion of the contract the work was to be delivered "complete and undamaged."

It has repeatedly been held that article 10 of the standard form of Government construction contracts (or similar provisions) puts the burden of repairing any damage to the contract work prior to its acceptance upon the contractor, notwithstanding the absence of fault on the contractor's part.³

Moreover, as one party to a contract is not responsible to the other party for losses occasioned by an act of God, the "changed conditions" article has been held to be inapplicable in such cases.⁴ The fact that the protective works constructed by the contractor may have been satisfactory to the Government inspectors cannot be held to have lessened the responsibility of the contractor, for this responsibility was imposed upon it by the terms of the contract. Indeed, it would have made no difference if the Government itself had constructed the protective works so long as it did not warrant their adequacy.⁵

In addition to article 10 of the contract, the specifications contained two provisions that reinforce the contractor's obligations in so far as the protection of the excavations is concerned. Paragraph A-23 of the standard specifications⁶ included the following provision:

Where the work to be performed under these specifications crosses or otherwise interferes with existing streams, watercourses, canals, farm ditches, oil, gas, or water pipe lines, drainage channels or water supplies, the contractor shall provide for such watercourses or pipe lines and shall perform such construction during the progress of the work that no damage will result to either public or private interests, and the contractor shall be liable for all damage that may result from failure to so provide during the progress of the work.

² These were defined in the article as "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications * * *."

³ See *Osberg Construction Co.*, 63 I. D. 180 (1956), and *McWaters and Bartlett*, IBCA-50 (October 31, 1956). Other judicial and administrative decisions are cited in these cases. Under article 16 (c) of the contract, the contractor was also made responsible for "the restoration of any damaged work."

⁴ *The Arundel Corp. v. United States*, 96 Ct. Cl. 77, 116 (1942); *The Arundel Corp. v. United States*, 103 Ct. Cl. 688, 711 (1945).

⁵ See, for instance, *Day v. United States*, 245 U. S. 159 (1917), in which the Government itself built the bulkhead but did not guarantee its effectiveness. When a flood occurred, the contractor had to perform extra protective work but the Court held that the contractor was not entitled to recover.

⁶ In addition to the Special Provisions of Specifications No. DC-4035, the Bureau of Reclamation's "Standard Specifications for Construction of Canal Systems, August 1951" were incorporated into the contract documents.

And, paragraph B-7 (c) of the standard specifications expressly provided that the unit price bid in the schedule for excavation for structures should include "the cost of all labor and materials for cofferdams and other temporary construction and of all pumping and unwatering, and of *all other work necessary to maintain the excavations in good order during construction* * * *" [Italics supplied].

It must further be considered in the case of each of the first four of the contractor's claims, however, whether it possesses any features that would impose responsibility upon the Government for the repair of the damage caused by the rainstorm, or further support the Government's contention that the contractor was bound to repair the damage so caused.

Claim Item 1

The Eagle Tail Headworks, which was to replace a similar obsolete structure, was to serve to control the amount of water released into the Eagle Tail Canal from the flow of two creeks, Eagle Tail Creek and Chico Rico Creek, the surplus flows to be released again into the Eagle Tail Creek Channel. The new headworks was placed approximately in the center of a wide sweeping curve in the old channel. The contractor's own forces excavated the channels leading to and away from the structures but the structure work itself was subcontracted to the D. W. Falls Construction Company, which in turn had two subcontractors, C. E. Caldwell and Ace Construction Company.⁷

At the time of the rainstorm with its resulting flood the Eagle Tail headworks was almost completed, and the prime contractor's dragline was close to the structure site. However, the concrete placement had not been entirely completed, and the forms had not been removed. As protective measures, the prime contractor had left "plugs" or unexcavated earth sections, both above and below the structure site in order to direct the flow of water around the structure site into the old channel. Although the plugs remained intact after the flood, the structure site was inundated, the waters both flowing through the site and backing up into it. Nevertheless, the structure itself was not washed out, and there was no significant damage other than the depositing of silt. The problem of restoring the *status quo* was, therefore, primarily one of pumping and cleaning.

The principal dispute between the contractor and the Government, so far as this claim is concerned, is apparently whether after the storm, the contractor was required to dewater the headworks structure three rather than two times. The contractor contends that it

⁷ Indeed, a marked feature of the job was the extent to which all the work under the contract was subcontracted; the prime contractor performed only the excavation and pipe placing work. In all there were six subcontractors or sub-subcontractors.

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was required to do so three times, although the contracting officer considered that it had been *directed* to do so only two times. There is no doubt that the operation was actually performed three times, for the contracting officer found that shortly after the storm the contractor began of its own volition to dewater the stilling basin section of the headworks structure in order to make possible the removal of forms and the finishing of the formed surfaces of the concrete placed prior to the storm. However, the contracting officer also found that due to the limited character of the contractor's equipment and modes of operation the headworks structure was never completely dewatered during this time. Consequently, the contractor was ordered on July 1 to undertake a dewatering operation, which disclosed surface irregularities in the concrete adjacent to the dentations. Apparently the contractor did not work for a number of days, however, with the result that the water rose both inside and outside the stilling basin, and the contractor was ordered on July 6 to dewater the stilling basin completely so that a more thorough investigation of flood damage could be made. The contractor then pumped for a number of days until a heavy runoff intercepted by the Eagle Tail Canal again inundated the stilling basin. At this point the contractor was told he need make no further attempts at dewatering, and that no repairs to the headgate structure would be required, although the reason for this sudden decision is rather obscure in the record.

The contracting officer held that the first dewatering operation which the contractor was *directed* to undertake was required by article 6 (b) of the contract, which provided that the contractor "shall furnish promptly without additional charge, all reasonable facilities, labor and materials necessary for the safe and convenient inspection and test that may be required by the inspectors," and hence that no additional compensation was due for this dewatering operation. He allowed \$719.55, however, to cover the cost of the dewatering operation which was discontinued after the runoff.

There is attached to the contracting officer's findings a letter dated December 8, 1955 from the Ace Construction Company, the sub-subcontractor which actually performed the dewatering operation, to the D. W. Falls Construction Company in which it is asserted that the Bureau demanded right after the flood that all silt be removed so that the concrete work could be inspected for possible damage and that two of the Government inspectors found no structural defects after the pumping and cleaning had been performed, so that the subcontractor felt that pumping could be discontinued. At the hearing, however, the contractor failed to produce any of the subcontractor's personnel involved in the dewatering and cleaning opera-

tions while, on the other hand, the Project Construction Engineer did testify on behalf of the Government that the project personnel did not direct the pumping undertaken prior to July 1. Since the contractor necessarily had to dewater the structure site at least to some extent to be able to remove the forms, it could have undertaken this operation even though it did not concede any responsibility for the storm damage. On the whole record, the Board must find that only two dewatering operations were directed by project personnel.

Another contention of the contractor appears to be that the Eagle Tail Headworks were so located and designed that "in the event of a flood it would of necessity be completely covered by water with resultant damage." Even assuming that this contention is well-founded—and the readiness with which the structure was flooded during and after the storm lends some credence to the contention—both the location and design of the structure was, of course, known to the contractor, and it, therefore, necessarily accepted the risk that flooding might occur during the period of construction. In other words, the contention is only a statement in another form of the contractor's general contention that it was not responsible for the repair of flood damage.

Finally, the contractor calls attention to the fact that in a suit against it in the United States District Court at Albuquerque brought apparently by the D. W. Falls Construction Company—in which the work done by it, as well as its sub-subcontractor, the Ace Construction Company, in repairing the storm damage at the Eagle Tail headworks, as well as at the Willow Creek wasteway, was involved—the court held that notwithstanding the inclusion in the subcontracts of a clause specifically obligating the subcontractor and the sub-subcontractor to the same extent as the prime contractor was obligated to the Bureau of Reclamation, the sub-subcontractor was entitled to recover the costs of the rehabilitation work after the flood on a theory of implied contract. The subcontracts were not offered in evidence, however, and the decision of the court was not produced at the hearing. Judging from the record, however, the basis of the decision appears to have been that the prime contractor had failed through another subcontractor to perform on time certain work which should have been performed before certain operations of the subcontractors involved in the suit were to be commenced. The clause quoted in the contractor's brief as the basis for the court's decision only obligated the subcontractors, moreover, to the extent that the provisions of the Bureau contract were applicable to their contracts, and this would not necessarily include the obligation to deliver the work *as a whole* "complete and undamaged." In any event the court's decision does not seem to have been to the effect that the contractor was relieved of its con-

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tractual obligation towards the Government to deliver the work "complete and undamaged."

As the contracting officer has allowed compensation for the additional dewatering operation not permissible under the terms of the contract, and the claim is otherwise without merit, it is denied.

Claim Item 2

The Willow Creek wasteway was constructed to replace an old wasteway. The old structure was an outlet works in an old earthen dam across Willow Creek, that intercepted the flow of Willow Creek and carried the water down the Eagle Tail Canal. In the course of the years the reservoir formed by the dam had been completely filled up with silt, and a small channel had been constructed through the silt bed in order to convey the flows of the canal through the silt bed, which was about 35 feet higher than the level of the old Willow Creek Channel just below the dam. The new Willow Creek wasteway was described by the Project Engineer as "a combination structure of precast concrete pipe with concrete inlet transition and a concrete structure at the outlet end of the pipe." The work to be performed under the contract included the cutting of the dam across Willow Creek at a point close to the channel through the silt bed, and the removal of the old wasteway structure, as well as the deepening of the channel which was to carry the water from the outlet works back to Willow Creek.

To protect the excavation the contractor's subcontractor, C. E. Caldwell, placed material therefrom along the lower bank of the Eagle Tail Canal between the canal and the structure site. This protective dike, which appears to have been deposited in rough waste piles, was, according to the testimony of Caldwell, approximately 15 feet in height. In addition, Caldwell constructed across the silt bed an access road which blocked the canal directly in front of the structure site, except for a culvert consisting of a 30" pipe which Caldwell placed in the bed of the canal beneath the road fill.

Prior to the commencement of the construction work under the contract, the Vermejo Conservancy District had used the dam or dike across Willow Creek as an access road to the lower reaches of the canal. When Caldwell's excavation breached the road, the District used a dozer on the rough spoil piles that formed the protective embankment for the structure site to convert it into a substitute access road. This was done without objection on the part of the subcontractor.

It appears also that during the progress of construction before the flood the District decided to relocate a channel for the Eagle Tail

Canal across the silt bed above mentioned. The channel was 8 feet wide at the bottom and 20 feet wide at the top, and natural earth plugs were left at the intake and outlet ends of the channel, so that the water from the Eagle Tail Canal would not enter the channel. This relocated channel across the silt bed was actually constructed under a cooperative arrangement between Caldwell and the District under which the former performed the work for the District with his drag-line in exchange for the latter's permission to use its dozer in performing the work which he was required to do under his subcontract covering the Vermejo Project. At the request of the District, the Bureau of Reclamation staked the excavation for the relocation of the canal but did not otherwise participate in its construction.

Prior to the occurrence of the rainstorm on May 17, the old wasteway structure had been removed, the required excavation had been substantially completed, the pipe had been laid, and the concrete poured for the floor of the outlet structure. So severe were the effects of the storm, that the flood poured over the canal banks, and the contractor's protective dike, and flowed right through the construction site. The pipe was washed away and had to be recovered; the floor of the outlet structure was buried in mud, although it remained intact, except that the steel had to be straightened. A good deal of channel degradation occurred in the channel of the Eagle Tail Canal through the silt bed up to the point of its confluence with Willow Creek, a distance of some 300 yards. At the structure site itself the excavation for the foundation was eroded to a depth of 20 to 25 feet below the level of the structure. The cut which the contractor had made through the dam was considerably widened on each side beyond the specified pay lines, and the contractor was required to reslope the side banks to prevent cave-in and provide a solid base for the backfill that was still to be placed, and also to re-excavate that portion of the canal that was below the outlet structure. The total quantity of earth eroded from the structure site that was outside of the designated pay lines, or neat lines was 5,250 cubic yards. It is apparent that to repair the storm damage that the contractor had to fill in with material as well as to remove material that had been deposited. While in the case of the Curtis Creek wasteway discussed below the contracting officer expressly distinguished between the backfill "required for the repair of flood damage" and "the regular backfill,"^s he did not do so with respect to the Willow Creek works.

The Government and the contractor accuse each other of conduct that contributed to the magnitude of the disaster caused by the storm. The Government argues that the contractor was at fault in not co-ordinating the work of the various contractors and subcontractors

^s See paragraph 24 of the findings of fact.

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who participated in the job, and seeing to it that they performed their subcontracts on time, in which case the work could have been completed before the storm occurred; also in failing to construct more adequate protective works; and finally in constricting the channel of the Eagle Tail Canal leading to the site of the work with a culvert that had too small a diameter.

The contractor contends, on the other hand, that the Government was at least partly responsible for the damage caused by the storm because it permitted the Vermejo Conservancy District to construct the substitute access road and to relocate the channel for the Eagle Tail Canal across the silt bed. So far as these contentions are concerned, inasmuch as the subject matter of the contract was rehabilitation work on an existing irrigation system, the contractor should have expected that some maintenance work and even minor construction work would be performed during the construction period of the contract.⁹ The contractor could hardly have regarded this work as unusual since it raised no objection to either the access road or the relocation of the canal at the time the work was performed. In any event, the Board must find that the preponderance of the evidence supports the contention of the Government that the contractor has failed to show that there was a causal connection between the work performed by the District and the damage to the contractor's work. So far as the access road is concerned, the leveling of the contractor's rough dike seems to have actually increased its height at low points, and may thus have supplied greater protection than would otherwise have been the case. As for the relocated Eagle Tail channel, the excavation was not connected either with the Eagle Tail or the Willow Creek channel, and there is no convincing evidence that any substantial amount of water actually flowed through the relocated channel. But even if it were otherwise, and a causal connection did exist between the work undertaken by the District and the damage caused by the storm, the contractor's contention essentially would be that the Government interfered with its operations and rendered them more hazardous by constructing the access road and the relocated channel. The contractor then might have a claim for unliquidated damages but the Board lacks jurisdiction to consider and allow such a claim.

A more difficult problem is presented by another contention of the contractor which is that even if by the terms of the contract it was required to repair the storm damage, it was not required to do work

⁹ The contractor was warned in paragraph 32 of the Special Provisions of the continued operation of the irrigation system: Thus, there was included in this paragraph the provision: "The contractor's operations shall not interfere with the normal water requirements for irrigation or storage operations on the existing project during the irrigation season which extends from April to October 1." This provision, however, only served to emphasize what was apparent. Compare *Walsh Bros. v. United States*, 107 Ct. Cl. 627, 644 (1947).

outside the pay or neat lines. The solution of this problem would seem to depend in large part upon whether the contractor was negligent in its operations prior to the occurrence of the storm. Under the terms of the contract the contractor was required to repair the storm damage irrespective of fault on its part but this obligation would be limited to the restoration of the work it had undertaken under the contract. On the other hand, if the contractor were guilty of negligence in the conduct of its operations prior to the storm, it would be obligated to repair any damage attributable to its negligence, whether within or without the pay or neat lines.

The Government made a determined effort at the hearing to prove that the contractor had been at fault in the conduct of its operations prior to the storm but, so far as the Willow Creek wasteway is concerned, the Board is unable to conclude that such fault has been established. The burden of proving fault in such a situation as this rests with the Government, which is the party alleging the fault.

While it is true that the responsibility for providing adequate protective works was that of the contractor, and that it was not relieved of this obligation by the presence of the Government inspectors or even by their approval of the protective works provided by the contractor, the fact that these works appear to have been wholly satisfactory to the project personnel militates against any conclusion that the contractor was negligent. The contractor was entirely cooperative, and would have provided additional protection if it had been clearly demanded or even suggested by the project personnel. The storm proved to be, however, of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel, and hindsight should not be substituted for foresight in determining whether the contractor was negligent. It is true no doubt that the contractor did not coordinate too effectively the work of its subcontractors and their subcontractors, but whatever obligations the subcontractors may have breached with respect to the time of performance in carrying out their contracts with the prime contractor, the latter did not breach its contract with the Government in this respect, since the Government has recognized that the delay in the performance of the prime contract was excusable. As for the fact that the protective dike constructed by the contractor was somewhat lower than the height of the existing dam, and the fact that the culvert constructed by the contractor may have been too narrow, the Board is not satisfied that these involved negligent acts that were causative factors in magnifying the damage caused by the storm. Moreover, so far as the pipe for the culvert is concerned, the record establishes that it was furnished by the District and that its use was approved by the Bureau.

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As the contractor was not negligent in the conduct of its operations at the Willow Creek wasteway, its obligation was only to restore the contract work that had been damaged. However, while the Board does not believe that the scope of this obligation was so narrow that the contractor could not be required to do any work that was outside the pay or neat lines, it was not so wide that the contractor could be required to restore any property of the Government that may have been damaged by the storm.

Thus, the contractor could be required to remove any material from the excavation which had been deposited as a result of the storm,¹⁰ to replace any backfill which had been washed out by the storm, to restore the damaged portions of the wasteway structures, to complete those structures, and to reconstruct the segment of the dam which the contractor had excavated in order to build the wasteway. Furthermore, the contractor could be required to fill in the areas eroded by the storm to the extent that was reasonably necessary in order to provide adequate foundations or support for the wasteway structures together with the segment of the dam removed by the contractor, and to perform resloping operations or adopt other construction procedures to the extent that they were reasonably necessary in order to provide such foundations or support, for these steps would be essential to the restoration and completion of the contract work. But, so far as resloping, backfilling or other work in the eroded area are concerned, the obligation of the contractor was limited to reestablishing only so much of the former earth surfaces as would be reasonably necessary to admit of the wasteway being completed to the elevations, dimensions, and standards prescribed by the contract and to admit of the portion of the embankment removed by the contractor being replaced in like manner. The obligation could not be enlarged to the point where the contractor, who was required merely to make an opening through the embankment, would be required to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work.¹¹

Unfortunately, however, the record does not show whether the contractor was or was not required to do more than was reasonably necessary to restore and complete the contract work. Since the burden is on the contractor to establish his right to additional compensation, the Board would ordinarily have to reject the claim. In the present case,

¹⁰ The Board has already so held in *Osberg Construction Co.*, 63 I. D. 180 (1956), and in *McWaters & Bartlett*, IBCA-56 (October 31, 1956). Compare also *A. J. Paretti Contracting Co., Inc. v. United States*, 109 Ct. Cl. 324, 352 (1947) and *Newhall-Herkner Construction Co. et al. v. United States*, 116 Ct. Cl. 419, 447-48 (1950).

¹¹ Compare *Collier Electric Co.*, BCA No. 832 (January 6, 1945), 3 CCF 265, and *Kenney*, BCA No. 1007 (May 24, 1945), 3 CCF 829.

however, the Board is persuaded that such a disposition of the claim would be unfair. The minds of the parties never focused upon the real issue involved in the claim until after the contracting officer had made his findings of fact and decision. At the hearing, although some testimony was offered with respect to work outside the pay or neat lines, the contractor failed to request that the Government produce the cross sections which would establish not only the extent of the erosion at the Willow Creek wasteway, as compared with the extent of the excavation previously made by the contractor, but also the location and extent of the resloping, backfilling and other procedures involved in the various phases of the repair work. But the failure to make such a request was due to some confusion on the part of both parties as to whether such data went merely to the question of the extent of the damages. Actually, such information was necessary to prove or disprove the existence of liability.

In view of all these circumstances, the claim is remanded to the contracting officer for the purpose of making supplemental findings in accordance with the views expressed herein. If these findings indicate that the contractor is entitled to additional compensation, and the contractor is willing to accept such compensation, which should be determined in accordance with paragraph A-9 of the standard specifications, the contracting officer may provide for payment of such compensation to the contractor. If the supplemental findings indicate that the contractor is not entitled to additional compensation, or if the contractor is unwilling to accept the compensation offered to it, it may file an appeal with the Board within 30 days from the date of the receipt by it of the supplemental findings.

Claim Item 3

The nature of the rehabilitation work, as well as the prevailing conditions, at the site of the Curtis Creek wasteway were very similar to those at the Willow Creek wasteway but in this case all of the work had been subcontracted by the prime contractor. When the flood occurred, the pipe had been laid, the concrete structure had been completed but the backfill above the structure had not been put in place. The structure site had been protected by a dike similar to that at Willow Creek wasteway. As a result of the flood, the foundation underneath the structure was eroded, the inlet was tilted to the right and the first two sections of pipe were unjointed. The amount of earth eroded from the structure site was approximately 1,000 cubic yards. The rehabilitation work after the flood consisted of straightening the structure and backfilling around it, as well as redigging the canal below the outlet structure.

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The nature of the respective positions of the Government and the contractor is also very similar. The Government here stresses in particular the long delay of the contractor in backfilling around the structure site after its completion, and argues that this left the work in an exposed condition into the season of heavy rainfall. The gravamen of the contractor's complaint is that the Vermejo Conservancy District had prior to the award of the contract cleaned silt from the apron of the old wasteway structure, as well as cleaning a channel from the canal to the wasteway, and enlarging the channel leading away from the Curtis Creek wasteway, and that this work contributed to the damage caused by the storm. The contractor also contends, as in the case of the Willow Creek wasteway, that it was not responsible for restoring the excavation beyond the pay or neat lines.

So far as the minor channel cleaning is concerned, this was even more obviously ordinary maintenance work which the contractor should have expected. The contractor has not shown, moreover, that this work was a factor in causing the damage. Normally, the cleaning of the channels would have assisted in the dissipation of the floodwaters, and thus afforded some additional protection to the structure site. In any event, as in the case of the Willow Creek wasteway, whatever claim the contractor may have would be a claim for unliquidated damages which the Board could not consider and allow.

In the case of the claim involving the Curtis Creek wasteway, the Board is constrained to find, however, that the contractor was negligent in the conduct of its operations. In this case all the structure work had been completed as early as December 1954. It remained only to place the backfill above the structure, and this could have been accomplished by about two more weeks of work. But, although urged repeatedly to complete the job, the contractor had neglected to do so when the storm broke. Thus the work was left exposed to damage for about six months, which was an unreasonable length of time. Such exposure would involve danger to the structure even in an ordinary rainy season. If the structure had been backfilled before the flood occurred, the water would probably have passed through the completed wasteway structure without causing any substantial damage.

In view of the contractor's negligence, it was responsible for repair of all the damage, even though the work of restoration may have involved work outside the pay or neat lines. Moreover, in the case of the Curtis Creek wasteway, the extent of the erosion was far less than in the case of the Willow Creek wasteway, and it would, therefore, seem to be unlikely that the contractor was required to do much more than restore the contract work. The claim is denied.

Claim Item 4

This minor claim, which involves the Crow Creek siphon, actually presents no special feature that needs to be considered. The siphon was located in a wide, sweeping loop in what had formerly been a curve in the Eagle Tail Canal. A new channel was cut across this curve, and in carrying the excavation of the new canal away from the siphon, back to the point where it joined the Eagle Tail Canal, no plug was provided to prevent water flowing back from the Eagle Tail Canal to the siphon, although a plug had been placed at the upstream entrance of the siphon. When the storm occurred, the water backed up into the siphon site because of the failure to leave a plug at the downstream end. As a result heavy sediment was deposited in the new excavation between the end of the siphon and the connection with the old canal. As the precast concrete pipe portion of the structure had been placed and backfilled, the damage was minor, and the contractor only had to clean out the canal from the lower end of the structure to the entrance into the old canal. Thus the question of restoration of material outside of pay lines is not involved in this claim. Irrespective of any fault on the contractor's part in failing to provide the downstream plug, the contractor was bound to do the rehabilitation work, and this claim, too, must be rejected.

Claim Items 5 and 6

Claim Item 5 is for additional compensation for cleaning the Eagle Tail Canal near the site of the Eagle Tail headworks as a result of silting during the 1954 operating season, and Claim Item 6 is for additional compensation for cleaning stretches of the Vermejo Canal after the 1954 operating season. Both claims are thus unconnected with the rainstorm of May 17-20, 1955.

Although the contracting officer in his findings of fact and decision discussed each of these claims in a general way, he expressly denied both of them on the ground that the contractor had failed to file a timely written protest against being required to perform the work that constituted the subject matter of each claim. Paragraph 21 of the Special Provisions of the specifications incorporated by reference paragraph A-12 of the standard specifications, which provided that a contractor who "considers any work demanded of him to be outside of the requirements of the contract" shall immediately ask, in writing, for a written instruction or decision and shall, within 20 days after its receipt, file a written protest with the contracting officer, and further declares that "except for such protests as are made of record" in the manner and within the time limit specified, the decisions of the contracting officer shall be "final and conclusive." The Govern-

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ment now invokes this protest requirement as a bar to the consideration and allowance of either of these claims by the Board.

At the hearing the contractor's president admitted that in the case of these claims he had overlooked the requirement that he file written protests against work which he wished to contest. The claims were first advanced in the contractor's release on contract executed on January 6, 1956. As the project personnel had no knowledge that the contractor intended to make the claims until after the release had been executed, they failed to keep cost records in connection with the work. Irrespective of their merits, Claim Items 5 and 6 must be denied by reason of the failure of the contractor to file timely written protest.¹²

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer dated July 3, 1956, are modified, and as so modified are affirmed.

WILLIAM SEAGLE, *Member and Acting Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

THEODORE H. HAAS, the Chairman of the Board, who is on leave at the present time, did not participate in the disposition of this appeal.

LEASING OF PROPERTY ALONG THE INTRACOASTAL CANAL IN T. 15 S., RS. 1 AND 2 E., LA. MER., LOUISIANA

School Lands: Grants of Land

A grant to a State for school purposes attaches to no specific sections until the lands are surveyed, and prior to survey the United States may make other disposition of such sections which have been reserved for school use.

Public Lands: Generally

Lands which have been appropriated or reserved for a lawful purpose are not public, and are impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them.

Conveyances: Generally

Where through a mutual mistake of the parties a tract of land in a conveyance is incorrectly described, in equity the grant will be held effective as to the tract which the parties intended to convey.

¹² See *J. D. Armstrong Co., Inc.*, 63 I. D. 289, 316-17 (1956), and other authorities there cited.

M-36462

AUGUST 14, 1957.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

Mr. Austin W. Lewis, Pioneer Building, Lake Charles, Louisiana, has questioned the title of the United States to the area in the Intra-coastal Canal right-of-way through secs. 15 and 16, T. 15 S., R. 1 E., Louisiana Meridian, Vermilion Parish, Louisiana.

The Parish Board of School Directors of Vermilion Parish, Louisiana, executed a deed to the United States of the lands to be covered by the Canal in sec. 16 on August 11, 1908. This deed was ineffective as a conveyance because at the time it was executed the United States was already the fee simple owner of the land attempted to be conveyed.¹

It is true that sec. 16 in each township in the State of Louisiana was reserved for the support of the schools by section 10 of the act of March 3, 1811 (2 Stat. 665), but the law is clear that a grant to a State for school purposes attaches to no specific numbered sections until the lands are surveyed, and prior to survey the United States may make other disposition of such sections which have been reserved for school use, *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U. S. 634 (1876); *Minnesota v. Hitchcock*, 185 U. S. 373, 399, 400 (1902); *United States v. Morrison*, 240 U. S. 192 (1916); *United States v. Wyoming*, 331 U. S. 440, 444-446 (1947); *F. A. Hyde & Co.*, 37 L. D. 164, 166 (1908), and *State of Montana*, 38 L. D. 247 (1909). This doctrine is followed by the Louisiana courts, *Board of Directors of Public Schools of Parish of Orleans v. New Orleans Land Co.*, 70 So. 27, 138 La. 32, and *Meyer v. State*, 121 So. 604, 168 La. 146 (1929).

The lands involved here were not surveyed at the time of the deed from the School Board and never have been officially surveyed by the United States; therefore, at the time the School Board executed its deed, the School Board had no title to the lands in sec. 16, but title was in the United States.

The construction and improvement of the portion of the canal in question was authorized by the act of March 2, 1907 (34 Stat. 1089), which appropriated money for improvement of the Inland Waterway in accordance with House Document 640, 59th Cong., 2d Sess. As stated in the Annual Report for 1910 of the Chief of Engineers (page 1612): "By June 30, 1910 the waterway was nearly completed between Vermilion Bay and Grand Lake", and as of July 1, 1909, it was dredged 33,340 feet west of Vermilion Bay. The 1911 Report

¹ It was apparently thought that the land was State-owned. On January 31, 1883, the Secretary of the Interior approved a State indemnity selection of 160 acres in sec. 26, T. 8 S., R. 7 W., Louisiana Meridian, under the act of May 20, 1826 (4 Stat. 179), on the premise that the sec. 16 here considered was deficient in area. In fact, no such deficiency ever existed; the section actually contains 1,180.41 acres.

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of the Chief of Engineers (page 1753) indicates that the work of dredging the portion of the waterway between Vermilion Bay and Grand Lake was commenced under contract of September 19, 1908, and continues: "The canal between Schooner Bayou and White Lake was completed in February, 1911." Thus, by February 1911, the canal was actually constructed across sec. 16, and the land was appropriated to carry out the purpose of the 1907 act prior to survey, and no rights to the portion of sec. 16 so appropriated ever accrued to the State. The *status quo* of the title to the land now known as sec. 16 was not changed by any legislation, by survey, or otherwise prior to the actual construction of the canal and the appropriation under authority of law of the area occupied by the canal right-of-way.

On April 23, 1912, an act was passed (37 Stat. 90) which "fixed, reserved, and confirmed to the State for the benefit of the public schools as though official surveys had been regularly extended over such townships" all unsurveyed secs. 16 in Louisiana which lie in the same townships as lands which have been certified or patented in the State under the 1849 Swamplands Act. However, this act did not pass title to the portion of sec. 16 involved here because prior to its passage the land in question had already been appropriated to another public purpose.

Wilcox v. Jackson, 13 Pet. (38 U. S.) 498, 513 (1839) states,²

Whenever a tract of land has been appropriated to a public use, it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it, though they do not in terms except it.

Scott v. Carew, 196 U. S. 101 (1905), affirms:

Unless an intent to the contrary is clearly manifest by its terms, a statute providing generally for the disposal of public lands is inapplicable to lands taken possession of and occupied by the Government for a special purpose.

And *United States v. Minnesota*, 270 U. S. 181 (1926), holds:

Lands which have been appropriated or reserved for a lawful purpose are not public, and are impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them.

The 1912 act, therefore, must be construed in the light of the rule established by *Wilcox v. Jackson* and like cases, and when so construed, it must be held that it did not convey any title to the State for the right-of-way which had previously been appropriated.

² The following cases cited the *Wilcox* case with approval: *Mo. Kans. & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 119 (1894); *Leavenworth v. United States*, 92 U. S. 733, 741, 745 (1875); *Newhall v. Sanger*, 92 U. S. 761 (1875); and *Rutherford v. Greene's Heirs*, 2 Wheat. (15 U. S.) 196, 203 (1817). The Louisiana case of *State of Louisiana v. Garfield*, 211 U. S. 70, 71, 77 (1908) also relies on the *Wilcox* case as does the recent (1937) case of *United States v. O'Donnell*, 303 U. S. 501, 510. The Interior Department follows the *Wilcox* case in *David B. Morgan*, 60 I. D. 266, 270 (1948), and in *State of Florida*, 38 L. D. 352 (1909), the Department quotes the *Wilcox* doctrine.

In view of the above, the conclusion is reached that having appropriated the portion of section 16 in question to the use of the Inland Waterway prior to survey and prior to the act of 1912, the United States now holds fee simple title to that portion of section 16 covered by the Inland Waterway.

By deed of January 17, 1908, the Orange Land Company, Ltd., conveyed to the United States six described tracts of land, including a tract some 302 feet wide crossing section 15, T. 15 S., R. 1 E., Louisiana Meridian. The conveyance cited the act of March 2, 1907, *supra*, and its authority "for improving Inland Waterway Channel from Franklin to Mermonteau, Louisiana" over a right-of-way "to be furnished without expense to the United States." The granting clause reads:

In consideration of the benefits to accrue from said improvements, the party of the first part does hereby grant and convey unto the party of the second part all those certain tracts of land lying and being in the Parish of Vermilion and State of Louisiana.

The habendum clause provides:

To Have and to Hold, the above described premises, together with all and singular the rights and appurtenances thereunto belonging unto and to the use of the United States of America and its assigns forever.

The quoted language is that of a fee simple conveyance. The problem posed is in relation to the reservation in the deed that:

Until Congress shall have authorized and provided for the enlargement and widening of said canal, said company or corporation, its successors or assigns shall have the right to control, occupy and use any part of above described land not actually needed by the United States, in the same manner, and to the same extent as before the execution of the conveyance, and also the right to transfer, lease, quitclaim, or otherwise dispose of said property and every part thereof subject to the grant made to the United States.

This reservation is now redundant and of no effect as Congress authorized and provided for the enlargement and widening of said canal by the acts of August 18, 1941 (55 Stat. 641), incorporating by reference Sen. Doc. 94, 77th Cong., 1st Sess., and July 24, 1946 (60 Stat. 635), incorporating by reference Sen. Doc. 189, 79th Cong., 2d Sess., and Sen. Doc. 231, 79th Cong., 2d Sess. Corps of Engineers maps executed in 1949 and 1950 and titled "Mermonteau River, La., Proposed Work F. Y. 1950-51, Channel Improvement, White Lake to Vermilion Bay, Mile 27.98 to Mile 40.02, Plan, Profile, Sections and Borings, Spec. No. Civ. Eng. 16-047-50-139, File No. J-13-17192" show plans for widening and enlarging the original canal so as to cover substantially all if not all of the width described in the deed from the Orange Land Company, Ltd. I have been informed that the work proposed in the above Corps of Engineers maps has already been completed under authority of the 1946 act, *supra*.

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The canal, as actually constructed and completed in February 1911, lies roughly 1,000 feet northerly of the tract described in the deed. It is contended by Mr. Lewis that because of this fact the quoted reservation is still effective with respect to the strip so described.

From an examination of all available maps, it appears that the same discrepancy between the land description in the deed and the place of actual canal construction occurred not only with respect to section 15, but also with respect to other parcels conveyed in the same deed by the Orange Land Company, Ltd., across adjacent sections 17, 14, and 13 of the same township and range, and other described parcels farther east. Thus, although the deed described an oblique strip across the northerly portion of sections 14 and 13, the canal was actually constructed so as to cross the northwest corner of section 14, the southeast corner of section 11, and the south half of section 12. This section of the canal is a straight line continuation from the point of origin on the west shore of White Lake.

The official plat of survey of sections 1, 2, 11, and 12 was accepted March 7, 1857. Sections 28 through 35 had been officially surveyed and the plats accepted September 11 and 17, 1845. All the remaining sections of T. 15 S., R. 1 E. were for many years depicted cartographically as one-mile squares based on hypothetical protractors to an ideal township. See maps accompanying Reports of the Surveyor General for the years 1849, 1851, 1853, and 1854, and maps executed by the Corps of Engineers in 1907 of "White Lake to Vermilion Bay, Louisiana", and in 1937 of the "Inland Waterway From Franklin to Mermonteau River, Louisiana, Vermilion Bay to White Lake."

None of the other sections here involved were surveyed until the decree in *Louisiana Furs, Inc. v. State of Louisiana*, N. 3033, 12th Judicial District Court, Vermilion Parish, Louisiana. Pursuant to that decree, a plat of survey of the entire township was executed on May 17, 1939, more than 30 years after the Orange Land Company, Ltd., deed was signed. Only then was it discovered that the township contained land greatly in excess of an ideal township, and the excess was distributed among the intermediate sections, including sections 13 through 17, thereby creating sections nearly double normal size. See map in *Louisiana Furs, Inc. v. State of Louisiana, supra*, 1949 and 1950 maps of the Corps of Engineers, entitled "Channel Improvement, White Lake to Vermilion Bay", and current U. S. Coast and Geodetic Survey map executed in 1951.

The lack of adequate surveys at the time of the Orange Land Company, Ltd., deed led to inaccurate and conflicting maps which depicted supposed conditions which did not actually exist on the ground, and an erroneous description in the deed was not only possible, but probable. Nearly 50 years of peaceable possession by the United States of the land on which the canal was actually constructed

coupled with its absence of claim upon the land described in the deed, is clear and convincing evidence that both parties intended to deal with the land now occupied by the canal.

There is no basis in reason to believe that the United States intended to acquire, or that the Orange Land Company, Ltd., intended to convey, any land except that used in canal construction. The United States would certainly have had no use for a narrow and isolated strip of land across the sections here considered except as a location for the canal, and the Orange Land Company, Ltd., could hardly have expected any "benefits to accrue" from a canal constructed in an indiscriminate location across its land. One party was prepared to build a canal and the other was willing to provide land for its construction, and the meeting of the minds is unmistakably shown by the evidence upon the ground. The canal itself, as an ever-present landmark, has since its construction effectively put the world on notice and no claim to the occupied land has ever been asserted by third persons.

The case is clearly one fitting the well-established and universally recognized principle that "equity regards as done that which ought to be done." *Peter v. Beverly*, 10 Pet. (35 U. S.) 532 (1836); *Taylor v. Longworth*, 14 Pet. (39 U. S.) 172 (1840); *Gratz v. Cohen*, 11 How. (52 U. S.) (1850); *Cropley v. Cooper*, 19 Wall. (36 U. S.) 167 (1873); *South Dakota v. North Carolina*, 192 U. S. 286 (1904); *United States v. Colorado Anthracite Co.*, 225 U. S. 219 (1912); *Independent Wireless Telegraph v. Radio Corp.*, 269 U. S. 459 (1926).

The rule is that where through a mutual mistake of the parties a tract of land in a conveyance is incorrectly described, in equity the grant will be held effective as to the tract which the parties intended to convey. The mutual mistake in the description in the deed does not affect the rights of the parties, and the United States is entitled to reformation of the conveyance in order to reflect the clear intention of both grantor and grantee and to conform the description to the actual location of the canal on the ground. *Adams v. Henderson*, 168 U. S. 573 (1897); *Johnston v. Jones*, 1 Black (66 U. S.) 209 (1861); *Birkett v. Anderson*, 133 So. 129 (1931); *Hart v. Blabey*, 39 N. E. 2d 230 (1942); *Critchfield v. Kline*, 18 Pac. 898 (1888); *Chilstrom v. Enwall*, 210 N. W. 42 (1926); *Crookston Improvement Co. v. Marshall*, 59 N. W. 294 (1894); *Browneller v. Cole*, 18 Ohio Law Abs.; *Hausbrandt v. Hofler*, 90 N. W. 494 (1902); *Waller v. Colvin*, 92 So. 328 (1922), 151 La. 765; *Fair v. Williams*, 175 So. 631 (1937), 187 La. 953; *Branch v. Acme Homestead Assn.*, 169 So. 129 (1936); *Weber v. H. G. Hill Stores*, 29 So. 2d 33 (1946), 210 La. 977; *Broussard v. Succession of Broussard*, 114 So. 834 (1927), 164 La. 913; *Penn v. Rodriguez*, 38 So. 955 (1905), 115 La. 174; and *Franton v. Nelson*, 77 So. 767 (1918), 142 La. 850.

August 15, 1957

After a consideration of all evidence now available, I am of the opinion that the United States is the owner in fee simple of all the land underlying the Intracoastal Canal in T. 15 S., Rs. 1 and 2 E., intended to be conveyed by the Orange Land Company, Ltd.

ELMER F. BENNETT,
Solicitor.

EFFECT OF THE LAW PROVIDING FOR THE AUTOMATIC TERMINATION OF AN OIL AND GAS LEASE ON WHICH THERE IS NO WELL CAPABLE OF PRODUCING OIL AND GAS IN PAYING QUANTITIES UPON THE EXTENSION OF SUCH A LEASE PRIOR TO TIMELY NOTICE OF THE EXTENSION

Statutory Construction: Generally—Oil and Gas Leases: Extensions

The amendment to section 31 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181), by the act of July 29, 1954 (68 Stat. 585; 30 U. S. C., Supp. IV, sec. 188), providing for automatic termination of a lease, not containing a well capable of production, for nonpayment of the annual rental, when considered in connection with the text of the act which it amends, and its purpose is not considered to apply to a failure timely to pay the second annual rental for the extended 5-year period where notice of the extension was not mailed to the lessee in time for him to receive it and return the rental so that it would be received not later than the seventh anniversary date of the lease.

M-36458

AUGUST 15, 1957.

TO THE REGIONAL SOLICITOR, DENVER REGION.

Reference is made to your memorandum of April 9, concerning lease BLM 021377 which was issued on March 1, 1951, for a term of 5 years. It appears that on February 21, 1956, an application for a 5-year extension was filed, accompanied by the sixth year's rental but due to delay not the fault of the applicant, the application was not approved until February 28, 1957, on which date the Manager notified the lessee that unless the seventh year's rental was received by 3 p. m., March 1, the lease would automatically terminate by operation of the amendment to the leasing act made by the act of July 29, 1954 (68 Stat. 585).

The lessee states that the notice of the rental requirement was not received until March 2, a Saturday, and the approved extension application not received until the following day. On March 4, a Western Union money order for the rental for the seventh year was sent to the Manager, and he returned it to the lessee accompanied by a ruling that the lease had terminated by operation of law. The lessee then

returned the rental to the Manager and insisted that it be accepted and that the lease had not terminated.

On February 28, 1956, when the primary term of the lease expired, there was pending the timely filed application for its extension, accompanied by the requisite sixth year's rental. The record showed no legal bar to the granting of the extension. Under section 17 of the leasing act (30 U. S. C. sec. 226), the lessee was then "*entitled* to a single extension of the lease." (Italics added.) Upon approval of the application on February 28, 1957, under the doctrine of relation, the approval related back to the date of its filing thus precluding any interval of time occurring during which the lease was not in effect. But until the approval on February 28, 1957, there was no extension of the lease with the consequent obligation on the part of the lessee to pay the rental for the seventh year which ended on that date. The delay of approval until February 28, 1957, the last day of the seventh year, made it practically impossible for the lessee to comply with the prepayment rental requirement of the lease which became operative immediately upon the extension approval and to comply with the Manager's requirement that the rental be paid before 3 p. m., the following day.

You call attention to the fact that section 1 (2) of the act of July 29, 1954 (30 U. S. C., 1952 ed., Supp. IV, sec. 226), provides that the single 5-year extension of a lease shall be subject to the rules and regulations in force at the expiration of the primary term and conclude from that that the automatic cancellation provision, therefore, would apply to this lease. However, you point to language in *Donald C. Ingersoll*, 63 I. D. 397, 400 (1956), that where an applicant is deprived of a statutory right because of his failure to comply with a regulation "that regulation should be spelled out so clearly that there is no basis for disregarding his noncompliance" and you conclude that since the applicable regulation does not require successive payments during the pendency of an application for extension, the failure to pay the rental on the due date will not result in automatic cancellation.

I believe that the *Ingersoll* case, *supra*, is not authority for waiving the requirement that the rental be paid on or prior to the anniversary date of the lease. That case involved the question whether an application for extension was timely filed. The law did not specify *where* such an application should be filed. Neither did the regulation. The *form* of application, although a part of the regulation, merely stated that it was to be filed "in the proper land office." The application was *timely* filed in a land office, but not in the *proper* land office. The conclusion was in effect that there is a duty on the Department, where the law does not cover the proposition, to provide adequate regulations specifying its requirements.

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Here the law itself makes the requirement and a regulation cannot change it. Nor is a regulation necessary for the purpose of notice, since everyone is presumed to know the law.

If the failure of the lessee in this case to pay the rental not later than the date of its seventh anniversary is excusable, it is only because the law either permits that to be done or does not apply to this kind of case. The only exception in the law is where the anniversary date falls on a day in which the proper land office is not open, which has no application to this case. It remains to consider whether the law applies here.

If the sentence making the requirement is read alone it clearly applies. But it is a settled rule of construction applicable always, no matter how clear the language of a particular part of an act, that such part is not to be construed as though it stood alone. It *must* be considered in conjunction with all of the language of the act of which it is a part. *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U. S. 270 (1956); *Gayler v. Wilder*, 10 How. (51 U. S.) 477 (1850); *Red Bird v. United States*, 203 U. S. 76 (1906). Also where it is part of an amendment, the whole act as amended becomes the act. *Blair v. Chicago*, 201 U. S. 400 (1906). Then too, where amendatory or supplemental legislation apparently would have the effect of reversing a general policy of the Government, a clear expression of intent is necessary. *Ex Parte Crow Dog*, 109 U. S. 556 (1883). Where a general policy is settled and of long standing, an apparently complete departure from that policy should be assumed only where it is plainly apparent that that was the intent. See *United States v. Arizona*, 295 U. S. 174 (1935); *American Fur Co. v. United States*, 2 Pet. (27 U. S.) 358 (1829); *United States v. Fisher*, 2 Cranch. (6 U. S.) 358 (1805). Again even where the language may appear to have a plain meaning its history may raise such doubts that the search for meaning should not be limited to the statute itself. *Assn. of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U. S. 437 (1955); *United States v. Dickerson*, 310 U. S. 554 (1940); *Boston Sand Co. v. United States*, 278 U. S. 41 (1928). Likewise for consideration is the purpose to be served, particularly where the amendment appears to adopt a course diametrically opposite to the previous rule.

When we consider the law as it was, we note that no lease could be canceled for failure to pay the annual rental until after 30 days' notice to the lessee at his address of record and if that notice was not delivered by posting the notice for 30 days in the Land Office. The amendment provides neither for actual or constructive notice nor for cancellation but for automatic termination of the lease for failure to pay. As above stated, there are no exceptions. Yet for violations of any other term of the lease, notice is still a requisite. Thus, the new rental

default provision becomes an exception to the general rule of the law. These provisions are so inconsistent on their face as to seem to require that we ascertain the intent or purpose of the amendment. The fact that that amendment occurs in an act containing several others which are clearly designed to favor the lessee by relieving him of previously existing bars to the continuation of his lease also naturally prompts the query whether it was intended to be punitive in its effect. Examination of the legislative history shows that it was enacted for the dual benefit of the lessee and to lighten administrative burdens. Lessees familiar with private and State leases where failure to pay terminated the lease assumed the same to apply to Federal leases and were thereby entrapped into becoming unwitting debtors to the United States. Further, they had either to furnish a bond or pay rentals 90 days in advance of their due date. The United States had to issue some 1,000 notices each month, and prosecute efforts to collect past-due rentals often even to sue in the courts or—as sometimes happened—write off the debt as uncollectible, in which event the account would be kept active by the Comptroller General with a view to possible future offsets. It was obvious that a lessee being in possession of a signed copy of his lease, at all times was chargeable with notice that an annual rental was due and payable. The lease expressly so provided and it was in his possession.

In view of the retention of the notice requirement with respect to other violations, it seems apparent that Congress intended the new provision to apply to the regular, annual rental payment, the necessity for which the lessee had continuous notice, and that it was not intended to apply to a case where the lessee had no way of knowing that the obligation had accrued. The *Ingersoll* case, *supra*, although not directly applicable to this case, recognizes a salient principle of law that this Department has been scrupulous to follow, and that is that no one should be deprived of his rights without adequate notice.

It can be argued, of course, that just as an initial applicant for lease is required to keep his application in good standing, so must an applicant for the extension of a lease do so. But the Department has seen fit to treat the latter with greater consideration and, by regulation, has permitted the delayed payment of the sixth year's rental where, for any reason, it has not been paid at the time the extension application was filed. 43 CFR 192.120 (c). A lessee who does not receive notice that his extension application has been approved until all but a day or two of the sixth year has elapsed has reason to doubt whether his lease will be extended at all. He may have had experience with administrative delay where the question of his qualifications and the availability of land were involved, but normally the extension of a lease is a mere formality. He can hardly be cen-

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sured for inquiring before paying more whether the extension is to be granted.

I conclude that the intent of Congress was that the amendment was to apply to an obligation voluntarily assumed by the lessee and of which he had continuing notice in the lease issued and delivered to him or constructively to his assignees and that it does not apply to an application for extension nor to the extension until he has received notice of it in time to make any necessary payment in one of the usual ways for making such payment.

ELMER F. BENNETT,
Solicitor.

SEYMOUR GRAY ET AL.

v.

MILNER CORPORATION

A-27431

Decided August 21, 1957

Mining Claims: Possessory Right—Mining Claims: Patent

Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered as an adverse claim unless filed within the required time.

Mining Claims: Determination of Validity

Insofar as a protest against an application for patent on a mineral entry asserts that a patent applicant has not complied with the law in any manner essential to a valid entry, the protest will be considered by the Department.

Mining Claims: Patent—Administrative Practice

A suit pending in a State court based upon an asserted prior appropriation of a mining claim and amounting to an adverse claim against an application for mineral patent is not a judicial proceeding under section 2326 of the Revised Statutes which will stay action of the Department on the application for patent where the adverse claim was not filed in the land office within the time required by statute.

Mining Claims: Location—Federal Employees and Officers: Interest in Lands

The fact that a United States deputy mineral surveyor performed the work of locating a claim for a patent applicant does not, in the absence of evidence that at the time of location the surveyor had, or has since acquired, an interest in the land, make the location void by reason of section 452 of the Revised Statutes which prohibits the purchase or acquisition of interests in the purchase of public lands by officers, clerks, and employees of the General Land Office.

Mining Claims: Mineral Surveys—Mining Claims: Generally

If a deputy mineral surveyor of the United States who executed the survey for patent on a mining claim was one of the two witnesses signing the affidavit required by statute and regulation for proof of posting on the claim of the plat and notice of intention to apply for patent, the patent application will be rejected, unless a supplemental affidavit by a proper witness is furnished, because regulatory provisions that the surveyor of a mining claim will not be allowed to prepare for the claimant papers in support of the application and that the surveyor must have absolutely nothing to do with the case except in his official capacity as surveyor disqualify the surveyor as a witness of posting for the patent applicant.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Seymour Gray and Ora A. Dixon, executrix of the estate of Paul S. Dixon, deceased, have appealed to the Secretary of the Interior from a decision of October 9, 1956, by the Director of the Bureau of Land Management dismissing a protest against any and all proceedings by Milner Corporation for an application for patent on the Hazel lode mining claim situated in sec. 28, T. 38 S., R. 17 W., S. L. M., Washington County, Utah. Milner Corporation filed application Utah 015020 on April 1, 1955, for patent on the Hazel lode covering 15.935 acres, as shown by mineral survey No. 7237, Utah. The claim is apparently valuable for iron ore.

The appellants' protest, filed on June 14, 1955, against Milner Corporation's patent application, asserted that the Red Cap lode mining claim, located by Seymour Gray and Paul Dixon on October 1, 1950, and recorded on October 24, 1950, in the office of the County Recorder, Washington County, conflicted with the Hazel claim and was located prior thereto; that the protestants had discovered mineral within the Red Cap claim, marked the claim upon the ground, performed annual assessment work and complied with Federal and State laws regarding mining claims. The protestants stated that they intended to file suit against Milner Corporation to quiet title and for damages.

In a letter to the protestants' attorney, dated June 15, 1955, the manager of the Salt Lake City land office rejected the protest as not having been timely filed. On the protestants' appeal to the Director of the Bureau of Land Management, the manager's decision was affirmed.

Meanwhile, on June 28, 1955, two weeks after filing their protest in the land office, the protestants filed a complaint against Milner Corporation and the United States in the district court for Washington district, Utah. The complaint alleged that the Red Cap lode, located and appropriated by plaintiffs, was a valid claim when Milner Corporation located Hazel lode on all or part of the land

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covered by the Red Cap. Plaintiffs requested a decree that they own the Red Cap and that the claim of Milner Corporation be declared null and void; they also requested an injunction against further patent proceedings and an award of damages. After removal to the United States District Court for the District of Utah, the action was dismissed as to the United States by an order of April 24, 1956, on the ground that the United States had not consented to be sued. The case has apparently been remanded to the State court for disposition of the issues between appellants and Milner Corporation.

Sections 2325 and 2326 of the Revised Statutes (30 U. S. C., 1952 ed., secs. 29 and 30) prescribe the method of determining the right of adverse claimants to the possession of mineral lands for which a patent application has been made. Section 2325 provides that notice of the application for patent and of the plat of survey of the claim must be posted on the claim before the patent application is filed. Notice of the application for patent must be published for a period of 60 days and must be posted in the land office for the same period of time. Section 2325 then provides:

* * * If no adverse claim shall have been filed with the register and the receiver [now manager] of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Section 2326 provides in part:

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. * * *

Evidence in the record shows that notice of the Milner Corporation's application for patent was published for the period required by statute and regulation (once weekly from April 7 through June 2, 1955); that a copy of the survey plat and a notice of the application for patent were posted on the claim before and during the publication period; and that notice of the application for patent was posted for 60 days in the land office. The protest against the patent application, however, was not filed until June 14, 1955, after the expiration of the 60-day publication period.

The statutory provision limiting the time within which an adverse claim may be filed to the 60-day publication period is mandatory, and section 2325 of the Revised Statutes expressly provides that if no claim is filed in the land office within the required time, it shall be assumed that none exists (*Gross et al. v. Hughes et al.*, 29 L. D. 467 (1900); see 43 CFR 185.86). Failure to file an adverse claim within the time required by the statutory and regulatory provisions precludes consideration of the merits of such a claim (*American Consolidated Mining and Milling Co. v. De Witt*, 26 L. D. 580 (1898); *Burnside et al. v. O'Connor et al.* (On Review), 30 L. D. 67, 70 (1900); *Langwith v. Nevada Mining Company et al.*, 49 L. D. 629 (1923)).

Section 2326 of the Revised Statutes contemplates that controversies as to the right of possession of a claim between conflicting mining claimants, which are the basis of adverse proceedings in the courts, shall be tried and determined, unless the adverse claim is waived, before entry is allowed.

When an adverse claim is filed within the time required by section 2325, proceedings on the patent application are stayed (except for the publication and posting of notices and plat and the filing of proof thereof) until the controversy is finally adjudicated by the court or the adverse claim is waived or withdrawn (43 CFR 185.81). However, the Department has held that one who files an adverse claim in the land office after the expiration of the 60-day publication period and subsequently brings suit thereon, but not within the statutory period, is not an "adverse claimant", but only a protestant without interest (*Nettie Lode v. Texas Lode*, 14 L. D. 180 (1892)), and the courts have ruled similarly.¹ The Department has also held that where judicial proceedings are brought upon an adverse claim filed

¹ In an action on an adverse claim under section 2326 of the Revised Statutes, an allegation by the plaintiff that an adverse claim, in due time and form, was filed in the Land Office is necessary to confer jurisdiction upon the court to decide the controversy (*Lily Mining Co. v. Kellogg*, 74 Pac. 518 (Utah, 1903); *Cronin et al. v. Bear Creek Gold Mining Co.*, 32 Pac. 204 (Idaho, 1893); *Hunt et al. v. Eureka Gulch Min. Co.*, 24 Pac. 550 (Colo., 1890)).

In the absence of special circumstances such as fraud, he who fails to adverse until after the expiration of the publication period is absolutely cut off and cannot be heard to say that he has prior rights. Failure to file an adverse claim is a basis for a conclusive assumption by the Government that no adverse claim exists. Although anyone has a right under section 2325 of the Revised Statutes to protest against the issuance of a patent on a mining claim, he has no right to a contest which is lost by failure to adverse. In a protest, an applicant's claim to patent under the mining laws may be challenged, but the protestant's own right to the land may not be asserted. A protest against the applicant's right to a patent can be made only before the land department and cannot be made the basis of litigation in the courts (*Wight v. Dubois et al.*, 21 Fed. 693, 695, 696 (C. C. D. Colo., 1884)).

Sections 2325 and 2326 of the Revised Statutes provide a method whereby adverse claims to mineral lands may be tried in court and if an adverse claim is not filed within the time provided or judicial proceedings are not begun within the statutory period, any claim is waived (*Golden Reward Min. Co. v. Buxton Min. Co.*, 79 Fed. 868, 873 (C. C. D., S. Dak., 1897)).

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after the 60-day period, such proceedings do not preclude the allowance of a mineral entry or bar the issuance of a patent (*Nettie Lode v. Texas Lode, supra*). Thus, the failure to file an adverse claim during the period of publication is, by statute, a waiver of such a claim and section 2326 of the Revised Statutes does not authorize judicial determination of the right of possession of a mining claim as between an adverse claimant and a patent applicant if the adverse claim is not filed within the time required by section 2325.

In short, the well-established principles appear to be as follows: In order to present an adverse claim which will be cognizable by the courts, the claimant must file an adverse claim in the land office within the 60-day publication period. If he files late, he loses his right to have adjudicated his claim of right to prior possession of the land in controversy. He has only the standing of any person to call the Department's attention to asserted deficiencies in the application for patent, which excludes any claim based upon priority of possession. In any event, the decision of a State court under section 2326 goes only to the question of the right of possession of a mining claim as between the parties involved in the litigation, and this Department must determine all other questions relating to the right to a patent (*The Clipper Mining Co. v. The Eli Mining and Land Co. et al.* (On review), 34 L. D. 401, 411, 412 (1906)).

The appellants contend that because of various deficiencies in the Milner Corporation's application for patent and the patent proceedings, the publication of notice of the application for patent was ineffective to start the running of the period for filing adverse claims and that these deficiencies require the rejection of the application for patent. Moreover, they assert that the Hazel mining claim is void because it was located by a deputy mineral surveyor; consequently, the application for patent should not have been entertained by the Bureau of Land Management.

We will consider first the contention that the Hazel lode claim is void, for, if the contention is sound, it will dispose of the application for patent filed by the Milner Corporation and render moot any question of priority between the Hazel claim and the Red Cap claim. The appellants have standing to challenge the validity of the Hazel claim even though they may have lost the right to file an adverse against the claim by failing to act during the publication period.

The appellants assert that on September 9, 1951, the Hazel claim was located for Milner Corporation by a person who was then a deputy mineral surveyor for the United States; that Milner Corporation has admitted in its answer in the pending litigation between the appellants and the patent applicant that a United States deputy mineral surveyor made the location in the name of Milner Corporation; that a deputy

mineral surveyor is not qualified to locate a mining claim; and that the Hazel claim is, therefore, void.

The original location notice of the Hazel claim, recorded on September 15, 1951, in Washington County, Utah, names as locators:

"Milner Corporation

By, A. R. Shelton"

A brief filed by the Milner Corporation in this proceeding states that as a matter of courtesy, without claiming, receiving, or at any time having either directly or indirectly any interest in the Hazel claim, A. R. Shelton posted the location notice; that the Milner Corporation was the only locator having any interest in the Hazel claim; that nothing in the regulations forbids the posting of a location notice for a locator by a mineral surveyor; and that a mineral surveyor is not disqualified by statute or regulations from posting notices and plats.

Section 452 of the Revised Statutes (43 U. S. C., 1952 ed., sec. 11) provides:

The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

This statutory provision disqualifies United States mineral surveyors and deputy mineral surveyors from acquiring public lands or interests therein, *inter alia*, by making a mining location, and an attempted location in violation of the provision is void (*Waskey v. Hammer*, 223 U. S. 85 (1912); *Lavagnino v. Uhlig et al.*, 71 Pac. 1046, 1049 (Utah, 1903); *Floyd v. Montgomery*, 26 L. D. 122 (1898); *Seymour K. Bradford*, 36 L. D. 61 (1907)).

Departmental regulations in 43 CFR, Part 7, issued pursuant to section 452 and to the Secretary's authority to prescribe regulations for the conduct of the Department's officers and employees are broader in scope than section 452, but are relevant in determining the meaning of the prohibition against employees becoming interested in the purchase of public lands. 43 CFR 7.2 (b) provides:

"Interest" means any direct or indirect ownership in whole or in part of the lands or resources in question, or any participation in the earnings therefrom, or the right to occupy or use the property or to take any benefits therefrom based upon a lease or rental agreement, or upon any formal or informal contract with a person who has such an interest. It includes membership in a firm, or ownership of stock or other securities in a corporation which has such an interest: *Provided*, That stock or securities listed for public trading on a stock exchange or securities market may be purchased by an employee if the acquisition thereof will not tend to interfere with the proper and impartial performance of the duties of the employee or bring discredit upon the Department.

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There is nothing in the record in this proceeding to indicate that A. R. Shelton, whose name appears on the location notice, was or has become interested in the purchase of the claim as that phrase has been construed in court and departmental decisions and as the word "interest" is defined in the above-quoted regulation. Section 452 of the Revised Statutes and the regulations issued pursuant thereto which forbid direct or indirect acquisition of public lands or of interests therein do not forbid activities connected with the work of locating a claim. In the absence of evidence that a deputy mineral surveyor has an interest, as defined in 43 CFR 7.2 (b), in the purchase of a mining claim, an assertion to the effect that, as agent for another, he performed acts essential to the location of such a claim is not an assertion which, if established, would affect the validity of the claim by reason of the prohibitions in section 452, because the statute prohibits only the acquisition of a property interest or of rights in securing title to public lands and does not prohibit doing the work involved in locating a mining claim.² It follows that the protestants' assertion that the work of locating the Hazel claim was performed by a deputy mineral surveyor of the United States would not, if it were proved, be a basis for holding that the claim is void. However, because the only evidence in the record that the mineral surveyor has no interest in the claim is the statement to that effect by counsel for the patent applicant, and in order to dispel any possible doubt on the question, an affidavit will be required of the patent applicant and of the mineral surveyor who located the claim, stating that the surveyor did not have at the time when the Hazel claim was located and has not had since that time any interest in the claim as the word "interest" is defined by the departmental regulation (43 CFR 7.2 (b)) quoted above before any final action toward allowance of this application may be taken.

There being no other basis presented for declaring the Hazel claim to be void, we turn now to the question whether the appellants' protest can be considered to be an adverse within the scope of sections 2325 and 2326 of the Revised Statutes. On the face of the record, the

² An agent may make an original location of a mining claim, may make and sign the location notice which is posted and filed, and may perform any of the acts required to complete the appropriation for another (*McCulloch v. Murphy*, 125 Fed. 147 (C. C. D. Nev., 1903); *MacDonald et al. v. Cluff*, 206 P. 2d 730 (Ariz., 1949); 43 CFR 185.4).

When a mining location is made by an agent in the name of others, the person in whose name it is made becomes vested with the legal title to the claim, and, in the absence of a showing to the contrary, all interest in a claim located by an agent becomes vested in the principal to dispose of as he pleases (*Moore v. Hamerslag*, 41 Pac. 805 (Calif., 1895); *Whiting v. Straup*, 95 Pac. 849, 854 (Wyo., 1908); *United States v. California Midway Oil Co.*, 259 Fed. 343 (D. C. Calif., 1919)).

It is noted also that the regulatory provision (43 CFR 185.39) that when the original location is made by survey of a mineral surveyor, such location survey cannot be substituted for that required by statute is consistent with the conclusion that assistance to a locator from a mineral surveyor in the location of a claim is not prohibited.

appellants' protest was not filed until after the expiration of the 60-day publication period; consequently, on the basis of the rulings cited earlier, it cannot be considered a valid adverse but only as a protest. The appellants, however, contend that the patent proceedings were defective, specifically, that the published notice of the application for patent was invalid so that it did not start the running of the 60-day period. They assert, therefore, that their adverse was timely filed.

The appellants' principal contention is that the Hazel claim was improperly described so that they were unable to determine whether it conflicted with the Red Cap claim. They assert that the published notice of the application contained a misleading description, the survey of the Hazel claim did not show a conflict with the Red Cap, and that the abstract of title submitted by the applicants was defective. A comparison of the description of the Hazel claim in the published notice thereof with the plat of survey of the claim and with the description of the Red Cap contained in the papers filed on appeal³ indicates that the published notice of the application for patent on the Hazel claim contains a sufficiently accurate description of the area included to put ordinary persons interested in the land applied for upon inquiry and to enable anyone interested to ascertain correctly the position of the claim (*Reed v. Bowron*, 32 L. D. 383 (1904)). It is to be noted that the appellants do not contend that the description of the Hazel claim in the published notice was inaccurate. They contend only that it was misleading, that, for example, it would lead most people to think it described land in section 21 instead of section 28 where the claim is located. This contention cannot be sustained inasmuch as the published description of the Hazel claim described it by metes and bounds, commencing with corner No. 1 and concluding with the following:

Thence North 78 deg. 24 min. East, 644.7 feet to Corner No. 1 of said Hazel lode, the place of commencement, *and being located in the Northwest quarter of Section 28, Township 38 South, Range 17 W., S. L. M., containing an area of 15.935 acres * * ** [Italics added].

Other allegations by the appellants as to the abstract of title and the plat of survey go to the question of sufficient description of the Hazel claim to put the appellants on notice that it conflicted with the Red Cap claim, but they are equally groundless. The plat of survey, which was posted on the Hazel claim in two places, clearly showed the location of the claim. As for the abstract of title, there is no requirement that it show the existence of conflicting claims. After a careful

³ The amended notice of location of the Red Cap, filed as a part of the protest, states that the Red Cap is situated in Range 17 East rather than 17 West where the Hazel is located. Other papers which the protestants filed in this case state that the Red Cap is located in Range 17 West.

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review of the record, it is concluded that the Director's decision holding that the description in the applicant's notice was sufficient, that the abstract of title was adequate, and that the patent applicant had fully complied with the law and regulations governing notice by publication was proper (43 CFR 185.54-185.59).

The appellants contend also that the patent application is defective because certain affidavits in support thereof were prepared by a United States deputy mineral surveyor who was not qualified to so act for the applicant. This contention requires consideration of the scope of a surveyor's activities in connection with an application for mineral patent.

A mineral claimant must have a correct survey of his claim made under authority of the proper cadastral engineer, and such survey must be made before filing an application for patent (section 2325 of the Revised Statutes, *supra*; 43 CFR 185.38). A mineral claimant may employ any qualified United States mineral surveyor to make the survey of his claim, the surveyor to be selected from the register of qualified mineral surveyors which is maintained by each area administrator (43 CFR 185.49). Mineral surveyors are responsible for preparing a certificate of expenditures and improvements made by the claimant or his grantors on the claim and for executing the survey of the claim and returning the field notes and preliminary plat with the report of expenditures to the cadastral engineer (43 CFR 185.42-185.46). There are certain matters with respect to which mineral surveyors may not act and these are set forth in the following regulation (43 CFR 185.46) :

The duty of a mineral surveyor in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the cadastral engineer. *He will not be allowed to prepare for the mining claimant the papers in support of his application for patent.* He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths. It is preferable that both preliminary and final oaths of assistants should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense, or inconvenience would result from a strict compliance with this section, the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper cadastral engineer a full written report of the circumstances which required his stated action; *otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor.* He will not employ field assistants interested therein in any manner. [Italics added.]

It will be remembered that the original location of the Hazel lode was made for Milner Corporation by A. R. Shelton at a time when he is alleged to have been a United States deputy mineral surveyor. In an application of July 21, 1952, by Milner Corporation for survey of

the Hazel claim, the Corporation requested that the survey be made by A. R. Shelton, also known as Andrew R. Shelton, mineral surveyor. An amended notice of location of the Hazel claim, filed for record on October 4, 1952, names A. R. Shelton as witness of posting of notice and marking of boundaries. The field notes and plat of mineral survey No. 7237 covering four claims, including the Hazel claim, show that the survey was made between August 1 and 9, 1954, by Andrew R. Shelton, mineral surveyor, and the surveyor's certificate dated January 20, 1955, is signed by Andrew R. Shelton. An affidavit, dated March 22, 1955, and filed on April 1, 1955, apparently as part of Milner Corporation's application is signed by A. R. Shelton. In this affidavit regarding the mineral character of the claim, Mr. Shelton describes the physical characteristics of the land indicative of its mineral character, and reports the assay results of two samples of ore taken from the claim and tested for iron content. In another affidavit, dated March 26, 1955, and filed on April 1, 1955, as proof of posting the notice and plat, A. R. Shelton states that on March 26, 1955, he was present on the Hazel claim when the plat of survey of the claim was posted, as was notice of Milner Corporation's intention to apply for patent.

If A. R. Shelton and Andrew R. Shelton, the mineral surveyor of the Hazel claim, are one and the same person, and there is nothing in the record to suggest otherwise, it is apparent that the provisions in 43 CFR 185.46 that a mineral surveyor of a claim will not be allowed to prepare for the mining claimant the papers in support of the application for patent, and that the surveyor "must have absolutely nothing to do with the case, except in his official capacity as surveyor" have not been complied with in the instant case.

The latter provision apparently means that the surveyor must have absolutely nothing to do with the patent application proceeding except in his official capacity as surveyor. By itself, the phrase "absolutely nothing to do with the case" might be interpreted as meaning absolutely nothing to do with the mining claim from the time of its location. However, the regulation is included in Subpart D of the general mining regulations (43 CFR, Part 185) and Subpart D is entitled "Procedure to Obtain Patent." As 43 CFR 185.46 has reference only to the execution of official surveys required by statute to be filed with an application for patent on a mining location and to no other kind of proceeding before the Department, it is reasonable to assume that the prohibition against having anything to do with the case is a prohibition against having anything to do with the patent application proceeding. Accordingly, the fact that the official surveyor of a mining claim may have located the claim as agent for

August 21, 1957

the patent applicant would not, in itself, amount to a violation of this regulatory provision.⁴

An affidavit of at least two persons that a copy of the plat and notice of intention to apply for patent has been posted on the claim is required to be filed by statute and regulation in connection with a patent application (Rev. Stat. sec. 2325; 30 U. S. C., 1952 ed., sec. 29; 43 CFR 185.52). The affidavit of March 26, 1955, filed by the applicant to meet this requirement was witnessed by A. R. Shelton and one other person. A surveyor of a mining claim is prohibited by 43 CFR 185.46 from acting as the patent applicant's witness to the posting of the plat and notice of the claim. Consequently, if A. R. Shelton, who signed the affidavit of March 26, 1955, as a witness to the posting of notice and plat on the claim, is the same person as Andrew R. Shelton, who made the official survey of the claim, the proof of posting is defective because 43 CFR 185.46 prohibits recognition of a mineral surveyor as a witness for the patent applicant, and two witnesses of posting are required by statute and regulation. If only one of the witnesses signing the affidavit of March 26, 1955, may be recognized, the application for patent must be rejected as the proof of posting does not conform to statutory and regulatory requirements. However, the proof of posting, if defective, may be corrected by supplemental affidavit of a credible witness to the posting, who had nothing to do with the official survey of the claim (see *El Paso Brick Co. v. McKnight*, 233 U. S. 250, 259 (1914); *Stock Oil Co.*, 40 L. D. 198 (1911)).

It should be mentioned also that the affidavit of March 22, 1955, regarding the mineral character of the land, signed by A. R. Shelton and submitted with the patent application may not be considered in support of this application if the affiant is the mineral surveyor of this claim because 43 CFR 185.46 provides that the surveyor will not be allowed to prepare papers in support of the mining claimant's application for patent. This particular affidavit, however, is not a necessary part of the patent application, and consequently the possibility that it may not be used in support of the application will not affect the outcome of the appeal.

To sum up, it is necessary that the case be remanded in order to determine whether A. R. Shelton, who signed the notice of location

⁴ Departmental regulations apparently do not prohibit the official survey of a mining claim and the making of the report upon which the certificate of expenditures and improvements is based (43 CFR 185.42, 185.43) by a mineral surveyor who, in an unofficial capacity, has assisted a patent applicant in locating the claim. The propriety of permitting a mineral surveyor to perform the official survey and to make the official report of expenditures on a mining claim which he, personally, assisted in locating seems questionable because of the possibility of bias and lack of objectivity in the performance of his official duties. The Bureau is being requested to consider the amendment of the regulations discussed herein in order to better assure the impartial performance of the duties of mineral surveyors in connection with patent applications on mining claims.

of the Hazel claim and the affidavit of posting, is the mineral surveyor of the claim. If he is the same person, he and the Milner Corporation must furnish the affidavit of lack of interest previously described in this decision, and the corporation must, in addition, furnish a supplemental affidavit of posting. If the affidavits are not furnished, the application for patent on the Hazel lode must be rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision by the Director of the Bureau of Land Management is affirmed in part and the case is remanded to the Bureau for action consistent with this decision.

EDMUND T. FRITZ,
Deputy Solicitor.

INCLUSION OF OVERHEAD EXPENSES IN BILLINGS TO FOREST SERVICE UNDER SECTION 5(a), ACT OF JULY 23, 1955 (69 STAT. 367; 30 U. S. C., 1952 ED., SUPP. IV, SEC. 601)

Statutory Construction: Generally

When the construction of a part of an act in accordance with the apparent meaning of its text considered alone would not only cause a departure from a long-continued procedure and a system established by a series of laws, but result in an inconsistency in the act itself, it is competent to examine matters *aliunde* the text including other contemporary legislation upon which the act is known to have been patterned to determine the true meaning of the text as well as the intent of the legislative assembly which enacted it. Thus, where it would require one agency to assume a part of the cost of operations for which the law has appropriated funds to another agency but not other, related costs also covered by the same appropriation, resort will be had to appropriate extraneous aids to construction to ascertain the true intent of such provision.

M-36466

AUGUST 28, 1957.

TO THE REGIONAL SOLICITOR, PORTLAND REGION.

Assistant Regional Solicitor Dysart, on June 24, informed the Area Administrator, Area I, Bureau of Land Management, that section 5 of the act of July 23, 1955, providing for publication of notice to mining claimants "at the expense of the requesting department or agency" and for the requesting agency to serve personal notice upon certain claimants "appears to contemplate that the entire expense of giving notice to mining claimants shall be borne by the department or agency which has the responsibility for administering surface resources of the lands in question." Accordingly, he held that the Bureau of Land Management could properly include its "normal charge

August 28, 1957

of 5% for indirect or overhead expenses." The opinion quotes from certain opinions of the Comptroller General issued in relation to section 601 of the act of June 30, 1932 (47 Stat. 417; 31 U. S. C. sec. 686) (the Economy Act), apparently to support the use of estimated rather than actual costs in charging overhead expenses.

I agree that if the requesting agency is required by law to pay all of the expenses incident to the publication of the prescribed notice, the Comptroller General's conclusion that since the appropriations for both agencies concerned are from the same source and slight over or under charges would not result in a loss of revenue to the Government, the value of the service may be estimated. I question, however, whether the construction given to section 5 of the July 23, 1955 act is the proper one.

(1) A better view would seem to be that the language was limited to resulting costs, the payment for which no prior provision had been made by law. The Department of the Interior is the recognized forum for determining the respective rights (as between themselves) of rival claimants to public land. It regularly asks for and is supplied by appropriations with money to defray all of its proper costs incurred in the conduct of such proceedings. Since 1907 at least it has fulfilled that function where the conflict is between a Federal agency and a private claimant. Regulations of May 3, 1907 (35 L. D. 547). The Federal agency party to such proceedings has in the past paid only for those items for which a private litigant would pay.¹ Congress, in 1955, was well aware of the procedure and would not be expected to assume that the work in the land office incident to publication of the notice was an "expense" since it was already taken care of by an appropriation. There would be, of course, the actual cost of publication which one agency or the other would have to meet. There was also the question of service of personal notice. Congress made it clear as to both that the requesting agency should assume them but there is no reason to believe that it went beyond that.²

(2) Historically, with perhaps only one exception,³ the duty to cause notices in all types of land cases to be published has been vested by

¹ In some cases the Bureau of Land Management, because of lack of funds, has made agreements with other agencies under which such agencies have utilized bureau services to investigate and paid the costs of such investigations, adopting bureau personnel as their witnesses, presumably under authority of the laws under which they operate.

² Although the opinion only invokes section 601 of the Economy Act to support an estimated rather than an actual overhead cost, it is proper to point out that that act was purposely designed to cover situations where one agency having authority itself to make the contemplated expenditures and to do the desired work, saw fit rather to utilize the more convenient equipment or more experienced services of another agency. Here, where the law imposes the particular duty upon the Secretary of the Interior the principles of the Economy Act do not apply. Cf. 32 Comp. Gen. 534.

³ The act of June 3, 1878 (20 Stat. 90; 43 U. S. C. sec. 313), provides that the register of the land office shall furnish the applicant a copy of a notice of his application for publication at applicant's expense.

law in the land office officials. In some cases the law expressly provides that the cost of publication will be borne by the claimant, e. g. Revised Statutes, 2334, 30 U. S. C. sec. 39. In other cases the law is silent as to who shall pay the cost (act of March 3, 1879, 20 Stat. 472; 43 U. S. C. sec. 251), but in all cases the actual cost of publication has been taxed to the person for whose benefit it was made.

The function performed by the Bureau under the act of July 23, 1955, is essentially the same function it has always performed in cases involving the determination of rights to the public lands. The basis for your conclusion that it should make a charge for its services here appears to be that the words "at the expense of the requesting department or agency" precedes the words "shall cause notice * * * to be published." Since, in similar legislation the words first quoted follow or are clearly limited to the actual publication provision, this fact, if considered *in vacuo*, might justify your conclusion, although it is more reasonable upon the whole to conclude that "expense" is related solely to the cost of publishing the notice. Without this, however, the existence of a long continued contrary general practice, not to say a general system created and long maintained by a series of statutes would prompt me to question whether Congress intended to depart from it.

Neither the act nor its legislative history furnishes anything upon which the actual intent of Congress can be pinpointed. However, House Report No. 730, 84th Cong., on H. R. 5891, which became the act, refers to the procedure provided for in section 5 as "similar to that provided in Public Law 585, 83d Cong., 2nd Sess., 68 Stat. 708." Turning to section 7 (a) of Public Law 585, *supra*, we find the following comparable language:

Thereupon the Secretary of the Interior, or his designated representative, at the expense of the requesting person (who, prior to the commencement of publication, must furnish the agreement of the publisher to hold such requesting person alone responsible for charges of publication), shall cause notice of such application, * * * to be published in a newspaper * * *.

In view of the parenthetical language in the quotation, it seems apparent that no distinction was intended between either Public Law 585 or the act of July 23, 1955, with prior public land and mining legislation providing for the publication of notices but that, in the case of both laws the phrase beginning "at the expense of" was intended to modify the words "notice * * * to be published." For obvious reasons, the parenthetical language was omitted from the July 23, 1955 act, but there can be little doubt but that otherwise the provision in section 7 of Public Law 585 was the prototype of the similar provision in section 5 of the later act.

August 30, 1957

Further, if we assume that it was the intent to charge the requesting agency with the office costs incident to publication of the notice, we are left to wonder why or whether the same intent did not also include the Bureau's expense incident to any hearing which might result from any such notice. Certainly there is as much reason for the one as there is for the other, both being "costs of the court" as it were, and it would be more reasonable to assume that intent as to both than to assume it as to either alone.

ELMER F. BENNETT, *Solicitor*.

CAN A PARTNERSHIP COMPOSED PARTLY OF MINORS BE A RECOGNIZED APPLICANT FOR OIL AND GAS LEASES

Oil and Gas Leases: Applications

A partnership as such cannot take and hold oil and gas leases under the mineral leasing laws of the United States. An application (offer) filed by a partnership should be considered and treated as an application (offer) by an association of citizens.

Oil and Gas Leases: Applications

"Associations of such persons" as used in section 1 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181), means a plurality of persons acting in association rather than associations as entities.

Oil and Gas Leases: Applications

A minor may not take and hold a lease in his own right except through a guardian or trustee and this limitation of right applies equally whether the minor is a member of an association or is an individual applicant (offeror).

M-36463

AUGUST 30, 1957.

TO THE REGIONAL SOLICITOR, DENVER, COLORADO.

You gave an affirmative answer to the above question. As I see the problem, it really involves two questions, which may be stated as follows:

1. Can a partnership take and hold oil and gas leases?
2. If it can, may one or more of the members be a minor?

Section 1 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181), as amended, provides that oil and gas and other mineral leases may issue to citizens of the United States, associations of such persons, corporations organized under the laws of the United States or any State or Territory thereof and, as to certain minerals, to municipalities. It does not provide in terms for the issuance of leases to partnerships and the question is whether the fact that an unincorporated association for trade or business is a partnership, *Coleman v. Coleman*, 78 Ind. 344, 346 (1881); *Fisher v.*

Colorado Central Power Co., 29 P. 2d 641, 642 (1934), would justify a conclusion that leases may issue in the partnership name as such rather than to the "association of such persons."

Aside from the question whether a lease can issue to any of the several common law entities other than "associations of such persons", which is presently under consideration, a partnership as such cannot hold the legal title to realty unless authorized by statute. *Riddle v. Whitehill*, 135 U. S. 621 (1890); Tiffany, *Real Property*, 3d ed., sec. 443. A lessee's interest in an oil and gas lease is an interest in realty, Summers, *Oil and Gas*, Permanent ed., sec. 153. It follows that an oil and gas lease cannot, at least absent a statute authorizing it to hold realty, be issued to a partnership as such, but may be issued to the individual members thereof as an "association". Since it can hardly be assumed that Congress intended the identity of its lessees to depend on the varying laws of the several States, compare *Solicitor's Opinion*, M-36416, Feb. 27, 1957 (64 I. D. 44); *Utah Power and Light Co. v. United States*, 243 U. S. 389 (1917); and *Wilcox v. Jackson*, 13 Pet. (38 U. S.) 498 (1839), it is my conclusion that the Mineral Leasing Act does not contemplate the issuance of leases in any case to the (incomplete) entity known as a partnership. See in this connection 43 CFR 192.42 (e) (4) which refers to "an unincorporated association (including a partnership)." Both subsections treat a partnership as an association of persons rather than as an entity comparable to a corporation or an individual.

Finally, a careful analysis will show that the intent of the law is that leases may issue to one person or to more than one person where two or more are associated together rather than to associations as such. The emphasis is on "persons". It is significant in this regard that "corporations" are treated as entities and not as associations of persons, which they are in reality, while "associations" is used in a different sense to signify a plurality rather than an entity.

As to the second question: The requirement in 43 CFR 192.42 (e) (6) that the qualifications of the individual members of a "partnership" must be furnished necessarily implies that each member must be qualified to take and hold a lease. A minor may not do so in his proper person. 43 CFR 192.42 (d). Therefore, since each member of a partnership must establish his qualifications, a minor cannot as a member of a partnership join in an oil and gas lease offer unless he acts through a guardian or a trustee.

CHARLES M. SOLLER,
Associate Solicitor.

Approved: August 30, 1957.

EDMUND T. FRITZ,
Deputy Solicitor.

JOHN SNYDER

A-27445

*Decided September 9, 1957***Oil and Gas Leases: Cancellation—Oil and Gas Leases: Lands Subject to**

If there is persuasive evidence to show that a prior oil and gas lease was canceled and the cancellation was noted in the official tract book by means of a line drawn through the serial number of the prior lease, the person first filing a qualified oil and gas lease offer after the notation was made is entitled to a lease of the land involved.

Rules of Practice: Evidence—Oil and Gas Leases: Cancellation

Where, on appeal to the Secretary, a question of fact is presented as to whether or not the cancellation of an oil and gas lease was noted in the official tract book by means of lines drawn through the serial number of the lease, the name of the lessee, and the description of the land in the lease prior to the filing of an oil and gas lease offer for the same land, and the evidence in the record is conflicting and inconclusive, the case will be remanded to the Bureau of Land Management to make a further investigation and to allow the parties an opportunity to submit additional evidence on the question of fact.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John Snyder has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated November 16, 1956, which affirmed the decision of the manager of the Billings, Montana, land office, dated November 29, 1954, rejecting his noncompetitive oil and gas lease offer Montana 012151 for the reason that the land applied for was not available for leasing at the time the offer was filed because the relinquishment of a former lease which embraced all of the land applied for had not been noted on the official tract book. The Acting Director's decision pointed out that William B. Levy filed an oil and gas lease offer Montana 013185 embracing the same lands on June 21, 1954, after the relinquishment of the prior lease had been noted on the tract book. He also noted that the land involved had been included in State exchange application Montana 08353 which was filed prior to both oil and gas lease offers, and that no final adjudication had yet been made on the State application.¹

¹ Information has been received from the Montana State Supervisor that in the event State exchange Montana 08353 is consummated the mineral rights to the lands selected will be reserved to the United States. Therefore, there is no conflict between the State exchange application and the oil and gas lease offers involved.

Briefly stated the facts of the case are:

On September 24, 1953, the appellant filed noncompetitive oil and gas lease offer Montana 012151 to lease the S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ section 17 and the E $\frac{1}{2}$ NW $\frac{1}{4}$ section 20, T. 36 N., R. 3 W., P. M., Montana. By a decision dated November 29, 1954, the manager rejected the offer in its entirety for being in conflict with a 5-year oil and gas lease, Great Falls 087140, which was issued September 1, 1948. The manager stated that although Great Falls 087140 was canceled on September 1, 1952, the cancellation was not noted at the time the appellant's offer was filed, and that in accordance with the provisions of 43 CFR 192.43 the lands were not available for further leasing until after the cancellation had been noted on the tract book.

43 CFR, 1953 Supp., 192.43, in effect at the time the appellant filed his offer, provided in pertinent part as follows:

Sec. 192.43 *Opening of lands to further filings, where a noncompetitive oil and gas lease is canceled or relinquished.* Where a noncompetitive lease is canceled or relinquished and the lands involved are not on the known geologic structure of a producing oil or gas field or are not withdrawn from further leasing, *immediately upon the notation of the cancellation or relinquishment on the tract book of the land office [italics supplied]* * * * the lands shall be open to further oil and gas lease offers. * * *

The record shows that Great Falls 087140 was canceled on September 1, 1952, for failure to pay the fifth year's advance rental, and a notation to that effect was made in the serial register on the same date. The serial register also shows a stamp mark "Tr. Bk. Noted 6-17-54" indicating that a notation of the cancellation was entered 4:12 P. M. on the tract book on June 17, 1954, at 4:12 p. m.

The tract book entry for Great Falls 087140 shows a line drawn through the description of the land contained in the lease, the name of the lessee, and the serial number of the lease and contains the notation "Lease Cancelled 9/1/52 Tr. Bk. Noted 6-17-54 4:12 P. M."

In appealing from the manager's decision, the appellant stated that he personally examined the tract book at the time he filed his lease offer on September 24, 1953, and that at that time "The notation of cancellation of the lease Great Falls—087140 was made in the tract book by marking a pencil line through the description, through the serial number, through the lessee's name, and the word 'Cancelled' written out on the same line in pencil." The appellant then stated that after he received the manager's decision he checked the tract book again and found that while the pencil lines were still in place the

September 9, 1957

word "Cancelled" had been erased and the notations set forth in the preceding paragraph had been substituted.

In a letter dated February 4, 1955, addressed to the Director, responding to Snyder's appeal, Melvin A. Brown categorically denied the statements made by the appellant regarding the entry and erasure of the word "Cancelled" in the tract book. Mr. Brown stated that at the request of William B. Levy he had examined the records of the land office pertaining to T. 36 N., R. 3 W., and noted that the lands involved were not available for leasing until a "proper notation" was made in the tract book to cancel oil and gas lease Great Falls 087140; that after waiting a period of time for the "correct entry" to be made, he finally requested an employee of the land office to make the notation, and only after checking the tract book and finding the cancellation had been noted did he file an application in behalf of Mr. Levy.

Mr. Brown further stated in his letter that:

Prior to the notation placed in the Tract Book on June 17, 1954, I know of my own knowledge that the word "Cancelled" was not written in the Tract Book and that the Tract Book carried no notation at all. I looked at the Tract Book yesterday and saw a smudge that Mr. Snyder calls an eraser, but it does not look like an eraser to me, but like many of the dirt smudges that can be found throughout all of the books because of their age and handling of numerous persons. [sic]

Mr. Brown did not state specifically whether or not he saw any lines drawn through the land description, name of the lessee, and the serial number.

In his present appeal Mr. Snyder repeats his assertions as to the state of the tract book when he filed. Neither Mr. Levy nor Mr. Brown has submitted any further reply to the appeal.

The facts of this case, as stated, appear to bring it within the scope of a recent decision of the Director, Bureau of Land Management, which was approved by the Acting Secretary of the Interior on May 1, 1957. In that case, Continental Oil Company, the present holder, by assignment, of an oil and gas lease, Montana 012340, called the attention of the Department to an irregularity in the issuance of its lease and requested that the lease be recognized as a valid subsisting lease notwithstanding. The facts of the case were that, at the time oil and gas lease offer Montana 012340 was filed, an oil and gas lease Great Falls 087552 embracing the lands applied for had been canceled. The serial register had been noted "Lease canc. for failure of parties to pay 4th year's rental. Case closed—serial noted 6/30/52." The

serial number which appeared in the tract book as a part of the entry showing the issuance of lease Great Falls 087552, was lined out by a horizontal line drawn through it. No notation in words and figures was made on the tract book with respect to the cancellation or the date of its notation other than the line drawn through the serial number.

In his decision the Director pointed out that the pertinent regulation, 43 CFR 192.43, does not prescribe the manner in which the notation of the cancellation of a lease should be made, but that the manual of procedures then in force, prepared solely for the guidance of employees of the Bureau, provided that "The tract books must be noted to show the cancellations and to identify the decisions involved by dates and division letter of symbol."

The Director stated that, although it is generally customary to make a memorandum in writing to denote the cancellation of a lease, he had been informed by personnel of the Billings, Montana, land office that the manager had given instructions that the tract book was to be noted by drawing a line through the serial number of the lease; that this practice was relied upon and acted upon by the land office for a substantial period of time; and that since no line was drawn through an entry in a tract book for any other purpose, the existence of such a line could only mean that the entry was canceled.

The Director thereupon determined that the public was put on notice of the termination of the prior lease by the presence of the line drawn through the serial number used to identify that lease and that such line was a notation in the sense intended by 43 CFR 192.43. It was concluded that the notation was sufficient to put a prospective lessee upon inquiry and any prospective applicant had access to the plat and serial records of the land office to confirm any doubts as to the facts of cancellation.

It would appear that if, as asserted by the appellant, the land description, name of the lessee, and the serial number in the tract book were lined out when he filed his application, the ruling in the *Continental Oil* case should apply. However, although Mr. Brown has not specifically denied that such lines existed, his letter of February 4, 1955, seems to intimate as much. As there is no evidence that Mr. Brown's letter was ever served upon Mr. Snyder, as it should have been, and neither Mr. Brown nor Mr. Levy has submitted anything in opposition to the present appeal, it may be that the letter should now be disregarded. However, it would still be incumbent upon the Department, in the enforcement of its regulations, to satisfy itself that the facts were as claimed by the appellant.

September 13, 1957

Accordingly, the case will be remanded to the Bureau to receive further evidence from the appellant and Mr. Levy on what notations existed in the tract book with respect to the cancellation of lease Great Falls 087140 when the appellant filed his offer.² All statements based on personal knowledge or belief should be under oath. The Bureau should also make whatever independent investigation is possible.

If the evidence is persuasive that the facts as to the lining out of the entries are as asserted by the appellant, the appellant should be declared the first qualified applicant and an oil and gas lease issued to him absent some disqualification not appearing on the face of the record. On the other hand, in the event the evidence is inconclusive to sustain his allegations, it should be concluded that the stamped notation date reflects the true date of the notation of the cancellation and the rejection of the appellant's application will stand.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 E. R. 6794), the case is remanded for further handling in accordance with this decision.

EDMUND T. FRITZ,
Acting Solicitor.

APPEAL OF FRED SAULSBERRY

IBCA-65

Decided September 13, 1957

**Contracts: Damages: Liquidated Damages—Contracts: Bids: Generally—
Contracts: Interpretation—Contracts: Comptroller general**

As the Comptroller General has held that the term "accompanying papers" in paragraph 5 (b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document.

² It should be noted at this time that it is not clear whether Mr. Brown is authorized to represent Mr. Levy in further proceedings. It has not been shown that Mr. Brown is an attorney or someone otherwise authorized to practice before the Department as provided by 43 CFR, Part 1. If not authorized to practice, Mr. Brown can act only as a witness for Mr. Levy who must handle his case himself or through an authorized person.

Contracts: Appeals—Contracts: Interpretation—Contracts: Damages: Liquidated Damages

When there has been a failure to make provision in a contract for the assessment of liquidated damages, such damages may not be assessed against the contractor notwithstanding his failure to urge this as a ground for reversal. Such failure is not an example of "practical construction" of the contract by the parties, which has to do with interpretation of its terms during the period of performance.

BOARD OF CONTRACT APPEALS

Fred Saulsberry has filed a timely appeal from the findings of fact and decision of the contracting officer in the form of a letter dated November 8, 1955, denying him an extension of time for the completion of Contract No. 14-11-008-67, dated May 5, 1955, with the Bureau of Land Management.

The contract, which was on U. S. Standard Form 23 (Revised March 1953), and embodied the General Provisions of U. S. Standard Form 23A (March 1953), provided for the construction of one dike pit and one oil well dam (involving approximately 20,427 cubic yards of excavation and filling) at San Juan County, New Mexico.

The contract provided that the work should be completed within 40 calendar days of receipt of notice to proceed. As such notice was received by the contractor on May 31, 1955, the work should have been completed by July 10, 1955. It was not completed, however, until July 18, 1955, or 8 days late. The contracting officer denied the appellant's request for an extension of time for this period and deducted as liquidated damages the amount of \$400 which was at the rate of \$50 a day for each of the 8 days.

The appellant based his request for the extension of time on the ground that a tractor purchased by him for the job, which had been completely rebuilt by the seller and sold with a full warranty, had performed unsatisfactorily, as a result of the failure of the seller to install a front bearing on the idler shaft, and thus delayed the completion of the work. Clause 5 (c) of the contract provided that the contractor should not be charged with liquidated damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including, but not restricted to certain named causes. The contracting officer held, however, that "the failure of a supplier to perform its obligation to a contractor is ordinarily a normal hazard of business assumed by the contractor, and that it is not within the category of 'unforeseeable' causes."

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The respective positions of the parties is the same in the presentation of the appeal. While the position of the Government appears to be sound, in so far as the excusability of the contractor's delay is concerned, the Board must, nevertheless, reverse the decision of the contracting officer to assess liquidated damages against the appellant. A statement with reference to the assessment of liquidated damages at the rate of \$50 a day was included in the Invitation for Bids but no provision for such assessment was included in any of the contract documents. Although clause 5 (b) of the General Provisions of Standard Form 23A made the contractor and his sureties "liable to the Government, in the amount set forth in the specifications or *accompanying papers*, for fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, or if liquidated damages are not so fixed, any actual damages occasioned by such delay" [*italics supplied*], the Comptroller General has held that an invitation which included a liquidated damage provision not in the contract may not be considered a part of the contract under the general provision which incorporated "*accompanying papers*."* Department Counsel contends, however, that this decision of the Comptroller General is distinguishable, however, on the ground that in accepting the appellant's bid and in awarding him the contract the contracting officer transmitted to him, in addition to the contract on U. S. Standard Form 23, a purchase order (No. 3-A-404) for the same work on which was inscribed the notation: "In accordance with Invitation to Bid No. 55-66 and Contract No. 14-11-008-67 dated May 5, 1955."

The Board is unable to perceive why in the case of construction work the issuance of a purchase order in addition to the formal construction contract was deemed necessary or how it served any purpose. In any event, the Invitation for Bids was for a "construction contract," and the appellant in accepting the bid agreed only to "execute Standard Form 23, Construction Contract," in addition to the usual performance and payment bonds. He was, therefore, in no wise bound by anything contained in the Purchase Order, which was a wholly extraneous and unilaterally issued document. As the Comptroller General's ruling is not distinguishable on this ground, liquidated damages may not be assessed against the appellant notwithstanding his failure to urge the omission from the contract of the provision for liquidated damages as a ground for reversal. Such failure is not an example of "practical construction" of a contract by the

*See 35 Comp. Gen. 446 (1956).

parties, which has to do with the interpretation of its terms during the period of performance.

However, the contract does not preclude the assessment of such actual damages as the Government may have sustained as a result of the appellant's delay. While the amount assessed as liquidated damages may not be withheld from any payment due to the contractor, any amount which may be due as actual damages may be set off.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer dated November 8, 1955, withholding from the appellant \$400 as liquidated damages is reversed, but without prejudice to his right to withhold actual damages sustained by the Government, if any.

WILLIAM SEAGLE, *Member*.

I concur:

THEODORE H. HAAS, *Chairman*.

HERBERT J. SLAUGHTER, a Member of the Board, who is on leave at the present time, did not participate in the disposition of this appeal.

UNITED STATES v. ELBERT M. BARRON

A-27450

Decided September 18, 1957

Rules of Practice: Hearings—Rules of Practice: Government Contests—Mining Claims: Contests

Where the rules of practice of the Department provide that a hearing in a Government contest may be waived if all parties consent, and it appears in a contest brought against a mining claim that the disputed questions of fact can be satisfactorily resolved only by holding a hearing, the Department will not accede to a waiver of a hearing and a hearing will be ordered.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On July 30, 1956, adverse proceedings were brought by the manager of the Santa Fe, New Mexico, land office against the May Day No. 1 lode claim of Elbert M. Barron based on charges that (1) a valid discovery of minerals sufficient to support a location is not shown to exist within the limits of the claim, and (2) the lands within the limits of the claim are essentially non-mineral in character. An

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application for patent to the claim was filed by Barron on October 17, 1955, and the charges were based upon field examinations of the claim.

The notice of the adverse proceedings, dated July 27, 1956, which was served on the contestee on July 30, 1956, informed him that he was allowed 30 days after notice of the charges within which to respond under oath denying the charges, or showing a state of facts rendering the charges immaterial, "and applying for a hearing to determine the truth of said charges and answer" and that if he failed to appear at a hearing applied for, the allegations of the protest would be taken as confessed and the mining claim canceled.

On August 6, 1956, Mr. Barron filed an answer to the charges, denying them and affirmatively stating that the land is mineral in character. To support his allegation he asked that documents he had filed be incorporated in his answer to the charges. As the answer did not include a request for a hearing, the manager wrote him on August 8, asking whether he wished to have a hearing or let the Bureau decide the case "based on the facts."

In a reply dated August 1, 1956, Mr. Barron stated that he would like to appeal directly to the Director of the Bureau of Land Management; that when the appeal reached the Director he would file additional evidence; that there was already enough documentary evidence in the record; and that he considered that the matter had already been decided adversely against him by the land office. The case was then forwarded on appeal to the Director.

By a decision dated December 10, 1956, the Acting Director dismissed the appeal on the ground that the rules of practice do not afford a contestee a right of appeal from notice of charges against a mining claim, and remanded the case to the land office for the scheduling of a hearing. The Acting Director stated that should the contestee fail to appear at the hearing scheduled and present any testimony the decision rendered pursuant to the hearing scheduled would necessarily include consideration only of the evidence which was presented in behalf of the Government.

Mr. Barron has appealed to the Secretary from that decision. He states that he has shown by competent evidence that "valuable minerals in commercial quantities" exist in the claim, and that the objections by the field examiner, whose reports led to the filing of the charges against the claim, are without foundation and the examiner was motivated by prejudice. He indicates that the holding of hear-

ings impose onerous and unreasonable burdens upon applicants for mining patents, particularly from the standpoint of loss of time.

It is not at all clear just what issues are raised by Mr. Barron's appeal. It does appear, however, that what he in effect is asking is that the charges against his claim be dropped, that the documentary evidence submitted in support of his application for patent be accepted, and that a patent be issued to him. This means, of course, that no hearing would be necessary.

When an application for a mining patent is filed, it is standard procedure to make a field examination of the claim in order to determine whether the requirements of the mining laws as to discovery, patent expenditures, etc., have been met. If the field examination shows that the requirements have been satisfied and all else is in order, a patent is issued. No hearing is held. If the field examination discloses lack of compliance with the mining laws, charges are filed against the claim, a hearing is held for the submission of evidence, and a decision is then rendered upon the basis of the facts established at the hearing.

In this case, the files show that Mr. Barron's claim was examined on April 17, 1956, and re-examined on June 26, 1956. The conclusion of the field examiner was that no discovery of a valuable mineral has been made on the claim and that the land in the claim is essentially nonmineral in character. Charges were filed on the basis of the examiner's reports. Mr. Barron denied the charges, thus putting in issue the questions of fact as to whether a discovery has been made and whether the land is mineral in character. Mr. Barron is now asking that no credence be given to the field reports because of the prejudice of the examiner and that it be held on the basis of the *ex parte* statements and documents submitted by him at one time or another that he has made a valid discovery and is entitled to a patent.

It is evident that the controverted issues of fact can be satisfactorily resolved only after a hearing is held at which both sides can present their evidence in the form of testimony or documentary evidence, subject to the right of the other side to cross-examine. This procedure is provided for by the Department's rules of practice (43 CFR, 1956 Supp., Part 221). Accordingly, the Acting Director properly remanded the case for a hearing on the contest charges.

It is true that under the rules of practice a hearing may be waived by all the parties after an answer to the charges has been filed (43 CFR, 1956 Supp., 221.65 (b), 221.68). However, in view of the complete conflict between the evidence which has been submitted by the appellant and the field reports and the appellant's claim of bias

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and prejudice on the part of the field examiner, it is evident that a hearing affords the best means of developing the true facts. There is little doubt that the appellant would be completely dissatisfied with an adverse decision rendered against him on the basis of the record as it now stands. Accordingly, in the circumstances of this case, the Department sees no purpose in acceding to a waiver of the hearing.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

TEXAS PACIFIC COAL AND OIL COMPANY ET AL.

A-27517*Decided September 23, 1957*

Oil and Gas Leases: Unit and Cooperative Agreements—Oil and Gas Leases: Twenty-year Leases—Oil and Gas Leases: Royalties

The approval of a proposed unit agreement may properly be conditioned upon submission of a stipulation or other binding instrument to the effect that those Federal oil and gas leases committed to the agreement which provide for a 5 percent royalty rate shall, at the end of their respective 20-year terms or any extension thereof, become subject to the same royalty rate payable to the United States as would be applicable to renewals of such leases if the leases were not committed to the unit agreement.

APPEAL FROM THE GEOLOGICAL SURVEY

On March 15, 1957, Texas Pacific Coal and Oil Company filed an application for designation of an area to be developed and operated as the Bunker Hill Unit. On March 25, 1957, the Acting Director of the Geological Survey designated a unit area and stated that in the absence of objections not then apparent an executed unit agreement identical with the LeBar unit agreement would be approved if submitted within a reasonable time. An executed unit agreement was duly submitted for approval on May 21, 1957.

Thereafter, the Geological Survey orally advised Texas Pacific, the proposed unit operator, that the agreement would not be approved unless Texas Pacific submitted a stipulation or other binding instrument to the effect that beginning at the end of the respective 20-year

terms or extensions thereof of Federal leases committed to the unit agreement carrying a royalty rate of 5 percent to the United States, the royalty rate would be the same as the rate applicable to renewal leases in the absence of unitization. Texas Pacific declined to furnish the stipulation whereupon the Acting Director of the Geological Survey, in a letter dated July 5, 1957, notified the company that unless the requested stipulation was furnished in 30 days the unit agreement would be returned unapproved. The company thereupon appealed to the Secretary of the Interior.

Two 5 percent leases (Cheyenne 029728 (a) and 029643 (a)) are committed to the proposed unit agreement.¹ They were issued pursuant to section 14 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., sec. 223), which provided that, upon a discovery of oil or gas in land included in a prospecting permit, the permittee would be entitled to a lease for one-fourth of the land included in his permit, or for as much as 160 acres. The lease was to be for a term of 20 years at a royalty of 5 percent, with a right of renewal for successive periods of 10 years. Section 14 also provided that the permittee would have a preference right to a lease for the remainder of the land in his permit at a royalty rate of not less than 12½ percent. The two leases involved in this appeal were issued on November 16, 1937, and April 1, 1938, respectively.

Since 1940 the Department has provided by regulation that leases issued in renewal of 5 percent leases shall carry a graduated royalty rate commencing at 12½ percent (43 CFR, Cum. Supp. (1943), 192.81; 43 CFR 192.82 (a) (4)). This graduated rate is the rate that would be payable on the leases in question at the end of their 20-year terms under the stipulation required by the Acting Director. The appellant contends, in essence, that the leases are entitled to a 5 percent royalty rate so long as they are committed to the unit agreement regardless of the length of the terms of the leases.

Section 17 (b) of the Mineral Leasing Act (30 U. S. C., 1952 ed., sec. 226e) provides for unitization of oil and gas leases. The first sentence of the fourth paragraph of that section reads as follows:

Any lease issued for a term of twenty years, or any renewal thereof, or any portion of such lease that has become the subject of a cooperative or unit plan of development or operation of a pool, field, or like area, which plan has the approval of the Secretary of the Interior, *shall continue in force* until the termination of such plan. [Italics added.]

¹ Will F. Daley and the Estate of George E. Brimmer, holders of Cheyenne 029643 (a), and Wyoming Oil and Gas Company, Inc., holder of Cheyenne 029728 (a), have joined in the appeal.

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The appellant's case rests upon this sentence, specifically, upon the language "shall continue in force." The appellant urges that under this provision a 20-year lease is continued in accordance with all its terms, including the 5 percent royalty provision, so long as the lease is committed to the unit agreement. It argues that the word "continues" shows that Congress was aware of the distinction between the continuance of a lease and the extension or renewal of a lease (which would carry a higher royalty).

There is no disagreement with this interpretation, but it does not answer the issues raised. The issues are, first, whether the holders of the 5 percent leases can agree that the royalty rate on their leases will go up to a minimum of 12½ percent at the end of the first 20 years of their lease terms, even though the leases are continued past the 20-year period, without necessity for renewal, by virtue of their commitment to the unit agreement. Secondly, if the lessees have authority to agree to an increase in their royalty rate but are unwilling to do so, does the Secretary have authority to refuse approval of the unit agreement unless the lessees agree to an increase in the royalty rate? Lastly, if the Secretary has the authority, should he exercise it in this case?

The answer to the first question is plain. The first paragraph of section 17 (b) provides in part as follows:

For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof * * *, lessees thereof and their representatives may unite with each other, or jointly or separately with others, in collectively adopting and operating under a cooperative or unit plan of development or operation of such pool, field, or like area, or any part thereof, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary is thereunto authorized, in his discretion, with the consent of the holders of leases involved, to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of such leases * * *.

The second sentence of this paragraph plainly states that the Secretary, with the consent of the lessees, may "alter, change, or revoke * * * royalty requirements." This provision clearly authorizes the Secretary, with the consent of the lessees, to increase the royalty rate on 5 percent leases committed to a unit agreement even before the end of their 20-year term. It follows that lessees can agree to an increase in the royalty rate at the end of the first 20 years of their leases. It is indisputable then that the Acting Director had authority to ask the appellant to furnish voluntarily the stipulation involved in this appeal and that the appellant had authority to furnish the stipulation.

The appellant, however, ventures the argument that a 5 percent lease is as a matter of law continued in effect at the 5 percent rate so long as the lease is committed and that, therefore, even if the stipulation required by the Acting Director were executed it would be immediately nullified upon the approval of the agreement. In making this argument the appellant completely overlooks or ignores the language just quoted from the first paragraph of section 17 (b). That language answers his argument. The stipulation, if executed, would be completely effective.

This brings us to the second issue. The lessees being unwilling to consent to a change in the royalty rate, can the Secretary refuse to approve the unit agreement unless and until they do consent? The answer lies in the first sentence of the first paragraph of section 17 (b), quoted above. Lessees may enter into a unit agreement only when the Secretary determines and certifies that unitization is "necessary or advisable in the public interest." The appellant asserts that the Secretary can look only to conservation considerations in determining whether unitization is in the public interest, and not to purely monetary considerations such as a change in royalty rates. It claims that if monetary factors could otherwise be considered, Congress has removed them from consideration by providing that 20-year leases "shall continue in force" during their commitment to a unit agreement.

The trouble with the appellant's argument is that Congress has not said that in determining whether unitization is necessary or advisable "in the public interest," the Secretary is restricted to a consideration of conservation factors or any other factors. The language of the statute is broad and without limitation. If the Congress had intended that the Secretary's determination of what is in the public interest should be circumscribed, it may be assumed that Congress would have said so. In the absence of restrictive language we cannot read the first sentence of the first paragraph of section 17 (b) as precluding the Secretary as a matter of law from determining that a unit agreement is not advisable in the public interest because of the effect that it will have upon the royalty rates of Federal leases committed to the unit agreement.

The appellant's insistence that Congress, in providing for the continuation of unitized leases, has determined that it is in the public interest not to increase the royalty rate of such leases and that royalty rates are therefore not a factor that the Secretary can consider in determining whether unitization is in the public interest overlooks, again, the express grant of authority by Congress to the Secretary and

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the holders of unitized leases to agree to changes in royalty rates. Obviously, Congress has not determined that the public interest requires that the royalty rates of unitized leases shall remain fixed. In view of the express authority granted to the Secretary to request changes in royalty rates and the authority granted him to approve unit agreements when he deems such agreements to be necessary or advisable in the public interest, it is implicit in the Secretary's approval of a unit agreement which provides for changes in royalty rates that he has determined such changes to be in the public interest. It follows that the Secretary may determine that, unless a unit agreement provides for certain changes in royalty rates, it would not be advisable in the public interest to approve the agreement. See Solicitor's opinion, 56 I. D. 174, 189 (1937).

The remaining question is whether the Secretary should, in effect, determine that the stipulation required by the Acting Director is necessary or advisable in the public interest.

It appears that a policy of refusing to continue 5 percent leases at the 5 percent royalty rate throughout the period of their commitment to a unit agreement was established in 1948. On July 27, 1948, Assistant Secretary Davidson required the Mountain Fuel Supply Company, proponent of the Hiawatha unit agreement (I-Sec. No. 677), to add to the agreement a provision for increasing the royalty rate on 5 percent leases after a certain period of time. Such a provision, with modifications, was included in the agreement which was approved on June 23, 1949, by the Acting Director of the Geological Survey. According to the Geological Survey, in all unit proposals involving 5 percent leases subsequent to the action on the Hiawatha agreement, the Survey has obtained agreement from the lessees for royalty adjustment. Thus there has been in effect a general policy against continuing 5 percent leases at the 5 percent rate for the duration of their commitment to unit agreements.

The appellant urges that even if the policy has been in effect for 9 years it should be abandoned. However, the ground urged for abandonment is seemingly only that the policy is not authorized by law. The appellant does not address itself to question whether, if the policy is authorized by law, it should as a matter of secretarial discretion be discontinued or at least not applied in this case. Obviously, the discontinuance of the policy or the exemption of this case from the application of the policy would constitute a favoring of the lessees in this case over the holders of 5 percent leases which have been made subject to the policy over the last 9 years. Before such favoritism

is shown to the present lessees, some real justification should be adduced for it. No justification appears in the record or comes to mind. I conclude therefore that the policy should be applied in this case.

One contention by the appellant remains to be considered. This is that the Acting Director's requirement of the stipulation in question is contrary to the published regulations of the Department and that any deviation is not permissible under the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*) unless the regulations are amended or new regulations are published. The regulations referred to by the appellant have been read (43 CFR 192.122; 30 CFR, 1956 Supp., 226.4, 226.12). They neither expressly nor impliedly forbid the requesting of the stipulation in question. On the contrary, 30 CFR, 1956 Supp., 226.4 expressly recognizes that there can be departures from the form of unit agreement set forth in section 226.12.

There being no error shown in the Acting Director's decision of July 5, 1957, the decision is affirmed.

ROGER ERNST,
Assistant Secretary.

THE DREDGE CORPORATION

A-27429

Decided September 23, 1957

Rules of Practice: Appeals: Service on Adverse Party

Where a decision of the Director of the Bureau of Land Management indicates that there are adverse parties involved but fails to name them, an appellant from that decision is not required to serve such parties with copies of his notice of appeal.

Rules of Practice: Appeals: Generally

A motion to strike an answer filed by one who petitions to intervene on an appeal to the Secretary will be denied where the answer is a joint answer filed also by an adverse party who is entitled to answer the appeal.

Mining Claims: Lands Subject to—Mining Claims: Special Acts

Land included in oil and gas leases under the Mineral Leasing Act in 1952 was not then subject to mining location and, in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such land in that year are invalid.

Mining Claims: Lands Subject to—Small Tract Act: Generally

Land under lease or patent pursuant to the Small Tract Act is not open to location under the mining laws.

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Mining Claims: Determination of Validity

No hearing is necessary to declare mining claims void *ab initio* where the records of the Department show that at the time of location of the claims the land was not open to such location.

Mining Claims: Lands Subject to

A locator of a mining claim does not acquire any property right by virtue of his location if the location is made on land not subject to appropriation.

United States v. Keith V. O'Leary et al., 63 I. D. 341 (1956) distinguished.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by the Dredge Corporation from a decision of the Director of the Bureau of Land Management dated October 3, 1956, wherein the Director affirmed the action of the manager of the land office at Reno, Nevada, in declaring 16 mining claims in the vicinity of Las Vegas, Nevada, to be null and void in whole or in part.¹ The claims were declared to be null and void insofar as they were located on land which had theretofore been classified for disposition under the Small Tract Act (43 U. S. C., 1952 ed., Supp. IV, secs. 682a-682e), because of that classification. In addition, five of the claims were also declared to be null and void, in whole or in part, because at the time of their location the land covered by those claims was embraced in oil and gas leases issued pursuant to section 17 of the Mineral Leasing Act (30 U. S. C., 1952 ed., Supp. IV, sec. 226).

The Director required that, in the event of an appeal from his decision, the corporation serve copies of its appeal on adverse parties, who, the Director stated, included all oil and gas lessees and all applicants and lessees under the Small Tract Act whose applications or leases conflicted with the claims. The Director did not name such parties. Pursuant to the Director's requirement, the corporation served with its notice of appeal some 387 persons, whose names and addresses it obtained from the Reno land office. Of the persons served, only Patricia A. Hampel, to whom a lease under the Small Tract Act had been issued on March 28, 1952, answered the appeal. Southern Nevada Home-Sitters, Inc., filed a petition to intervene in the proceeding and joined in the answer to the appeal. The Dredge Corporation filed a motion to strike both the answer and the petition

¹ See the appended schedule for the serial numbers assigned to the individual claims by the land office and for other pertinent information relating thereto.

to intervene. On January 30, 1957, the Deputy Solicitor advised the corporation that since the Director's decision had not named the adverse parties the corporation was not required, under the applicable rule of practice (43 CFR, 1956 Supp., 221.34), to serve anyone with a copy of its notice of appeal. However, the Deputy Solicitor noting that Patricia A. Hampel had answered the appeal and that Southern Nevada Home-Siters, Inc., had petitioned to intervene, required the corporation to serve copies of its brief on those parties. This the corporation did.

Before considering the merits of the appeal, the corporation's motion to strike will be disposed of.

Patricia A. Hampel is shown to have an interest in a portion of the land involved in the appeal adverse to that of the appellant. As an adverse party, her answer is entitled to consideration. As it is impossible to consider the Hampel answer without at the same time considering the arguments advanced by Southern Nevada Home-Siters, Inc., since there is only one answer joined in by both, whether or not the latter is permitted to intervene becomes immaterial. In the circumstances and in view of Miss Hampel's clear right to answer the appeal as an adverse party, the Dredge Corporation's motion to strike is denied.

The 16 claims were located in July 1952, after a major portion of the land covered by the claims² had been classified for lease and sale under the Small Tract Act by one or another of three classification orders.³ Only those portions of the claims covering land classified for small tract purposes were declared to be null and void.

The Director held that classification orders issued under the authority of the Small Tract Act create a reservation of the land so classified for disposal under that act and that land so classified is no longer subject to location under the mining laws (30 U. S. C., 1952 ed., sec. 21 *et seq.*). He held that since the three classification orders had been issued prior to the dates on which the mining claims were located, the mining claims were properly held to be null and void insofar as they included such classified land. In affirming the action of the manager in declaring five of the claims to be null and void in whole or in part for the additional reason that the land was embraced in oil and gas leases at the time of the attempted locations, the Director

² See the appended schedule for a description of the land embraced in each mining claim and the date of its location.

³ The orders were issued by the Acting Regional Administrator, Bureau of Land Management, on November 21, 1951, December 7, 1951, and January 25, 1952. See Nevada Small Tract Classification Number 62 (16 F. R. 12370), Number 76 (16 F. R. 12840), and Number 79 (17 F. R. 1482).

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held that since the claims were located subsequently to July 31, 1939, and prior to February 10, 1954, and that since there was nothing of record to indicate that the mining claimant had filed amended notices of location, as required if it desired to take advantage of the act of August 12, 1953 (30 U. S. C., 1952 ed., Supp. IV, secs. 501-505), as supplemented by the act of August 13, 1954 (30 U. S. C., 1952 ed., Supp. IV, sec. 521 *et seq.*), the mining claimant was not entitled to the benefits of those acts.

The appellant attacks the effectiveness of the classification orders on a number of different grounds and it questions the authority of the Director to declare the claims to be null and void on the basis of the classification orders without first having given the appellant notice and an opportunity to be heard. While it does not specifically challenge the correctness of the Director's decision insofar as it held those mining claims embraced in oil and gas leases at the time of their location to be null and void, it does so indirectly by asking that all the claims be held to be valid. Accordingly, the Director's ruling on this point will be reviewed before proceeding to a consideration of the Director's decision that the classification orders, in and of themselves, prevented the location of mining claims on the land classified for disposition under the Small Tract Act.

The Department has uniformly held that, after the passage of the various acts providing for the leasing of minerals on the public domain, there could be no room for the contemporaneous operation of the mining laws and the mineral leasing laws with respect to the same land and that if an attempt were made, after the enactment of those laws, to locate a mining claim on land covered by an outstanding permit or lease issued under the mineral leasing laws, the Department would not recognize the attempted location. See *United States v. United States Borax Company*, 58 L. D. 426, 432 (1943); *Joseph E. McClory et al.*, 50 L. D. 623 (1924); letter dated October 9, 1924, from Secretary Work to Congressman Richards, 50 L. D. 650 (1924).

By the act of August 12, 1953, *supra*, the Congress gave tacit approval to the position taken by the Department. By that act it provided, among other things, that any mining claim located under the mining laws of the United States subsequent to July 31, 1939, and prior to January 1, 1953, on lands of the United States which were at the time of such location included in a lease issued under the mineral leasing laws or covered by an application for such a lease shall be effective to the same extent as if such mining claim had been located on lands which were at the time of such location subject to

location under the mining laws of the United States. The act required, however, that in order to obtain the benefits of the act the owner of any such mining claim must, not later than 120 days after August 12, 1953, post on such claim and file for record in the office where the notice of location of such claim was of record an amended notice of location of such claim, stating that such notice was filed pursuant to the provisions of the act and for the purpose of obtaining the benefits thereof. The act provided further that any mining claim given force and effect under the act shall be subject to the reservation to the United States of all minerals subject to disposition under the mineral leasing laws.

A year later, on August 13, 1954, Congress passed another act under the terms of which mining claims may, thereafter, be located on lands of the United States which are at the time of location included in leases issued under the mineral leasing laws or covered by applications for such leases. The act of August 13, 1954, further repeated the substance of the act of August 12, 1953, and provided that in order to be entitled to the benefits thereof the owners of mining claims located on such lands subsequent to July 13, 1939, and prior to January 1, 1953, must have posted on the claims and filed for record within the time allowed by the act of August 12, 1953, amended notices of location, stating that such notices were filed pursuant to the provisions of the 1953 act and for the purpose of obtaining the benefits thereof.

Thus, in the present case, the five claims were located at a time when the land included in the claims, or portions thereof, was not open to mining location. No showing having been made by the locator of compliance with the act of August 12, 1953, those portions of the claims covered by oil and gas leases when the claims were located are without validity and the Director's holding in this respect is affirmed. *Clear Gravel Enterprises, Inc.*, 64 I. D. 210 (1957); *Edith F. Allen*, A-27455 (July 16, 1957); *Clear Gravel Enterprises, Inc.*, A-27287 (March 27, 1956); cf. *R. L. Greene et al.*, A-27181 (May 11, 1955).

Turning now to that part of the Director's decision which held that the classification of land for disposition under the Small Tract Act removes the land from the operation of the mining laws, I find that it is unnecessary at this time to determine whether the Director's ruling was correct, for the appeal can be disposed of on the basis of other considerations. All of the land classified for small tract disposition by the three classification orders mentioned above, except two five-acre tracts included in the Dredge No. 47 mining

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claim, was under small tract lease on the dates when the claims were located. In other words, the claims at the times of their location were almost *in toto* located on land which had already been leased to others. Could the claims be valid under those circumstances?

Land under small tract lease is subject to the provisions of the Small Tract Act and such regulations as the Secretary has adopted for the administration of the act. The Small Tract Act authorizes the Secretary of the Interior, in his discretion, to sell or lease to those who meet the qualifications set forth therein "a tract of not exceeding five acres of any vacant, unreserved public lands, public lands withdrawn by Executive Orders numbered 6910 of November 26, 1934, and 6964 of February 5, 1935, for classification, or public lands withdrawn or reserved by the Secretary of the Interior for any purposes, which the Secretary may classify as chiefly valuable for residence, recreation, business, or community purposes." It also provides that patents for all tracts purchased under the provisions thereof "shall contain a reservation to the United States of the oil, gas, and all other mineral deposits, together with the right to prospect for, mine, and remove the same under applicable law and such regulations as the Secretary may prescribe."

Among the regulations adopted by the Secretary is one (43 CFR, 1956 Supp., 257.16) which provides that leases, like patents, will reserve to the United States all deposits of coal, oil, gas, or other minerals, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe. The regulation provides further that while minerals subject to the leasing laws (30 U. S. C., 1952 ed., sec. 181 *et seq.*) in lands patented or leased under the Small Tract Act may be disposed of under applicable laws and regulations in force at the time of such disposal, other kinds of minerals which may occur in such leased or patented lands are not subject to prospecting or disposition until regulations have been adopted.⁴

As the act provides that the reserved minerals in lands subject to its provisions may be prospected for, mined, and removed only under applicable law and such regulations as the Secretary may prescribe and as the Secretary has not to date prescribed regulations permit-

⁴ Prior to the amendment of the regulation to its present form on January 10, 1955, the regulation stated specifically that "No provision is made at this time to prospect for, mine, or remove the other kinds of minerals," that is, non-leasable minerals (43 CFR 257.15). While 43 CFR, Part 257, has been revised several times, the substance of the regulation has been a part of the small tract regulations since June 10, 1940 (5 F. R. 2284), when regulations under the Small Tract Act were first adopted.

ting prospecting on lands under lease or patent pursuant to the Small Tract Act, it follows that those lands are not subject to location under the mining laws.

The appellant contends that the fact that the Secretary has issued no regulations relating to mining on those lands is proof that the mining laws apply. This is not so. The act makes the reserved minerals subject to disposition only under applicable laws "and such regulations as the Secretary may prescribe." The Secretary has prescribed that there shall be no prospecting for or disposition of the reserved deposits at this time and until he prescribes regulations permitting the prospecting for, mining and removal of such reserved deposits the lands in which such deposits may be found are not open to location under the mining laws.

As most of the land embraced in the 16 claims was under small tract lease at the time the claims were located, those portions of the claims embracing such leased land are without validity.

The appellant contends that mining claims cannot be declared invalid without resorting to the procedures outlined in the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1001 *et seq.*). It cites the Department's decision in *United States v. Keith V. O'Leary et al.*, 63 I. D. 341 (1956), in support of its position.

The *O'Leary* case did not hold that in no circumstances may a claim to land under the mining laws be declared null and void without affording the claimant notice and an opportunity to be heard. There was no question in that case as to the land being open to location under the mining laws when the claim was located. The Government attacked the validity of the claim on the ground that the land embraced in the claim was nonmineral in character and that minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. The decision held that, even though a hearing on the validity of a mining claim is not required by statute, when the Government initiates contest proceedings against a mining claim and orders that a hearing be held to determine the validity of the claim, the hearing must be conducted in accordance with the requirements of the Administrative Procedure Act. While certain language in that decision may appear to encompass all mining claims regardless of whether the land on which they are located was, at the time of location, subject to such location, the decision is not to be read so broadly. No hearing is necessary to declare mining claims void *ab initio* where the records of the Department show that at the time of location the land was not open to such location. *Clear Gravel Enterprises, Inc.*, 64 I. D. 210 (1957); *R. J. Walter et al.*, A-27243

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(March 15, 1956). The *O'Leary* case was concerned with the procedure to be followed where persons have gone on land subject to location. Such persons have acquired, under the mining laws, at least the right of possession against all except the Government and they may have acquired the entire equitable title to the land, if they have satisfied the requirements of the mining laws with respect to discovery. That is the property right sought to be protected by the *O'Leary* decision.

Here the appellant could have acquired no right in the land because it was under lease to third parties, segregated from the public domain, and not open to location. It is well settled that a locator does not acquire any property right by virtue of his location if the location is made on land not subject to appropriation. See *El Paso Brick Co. v. McKnight*, 233 U. S. 250 (1914); *Brown v. Gurney*, 201 U. S. 184, (1906), and *Gwillim v. Donnellan*, 115 U. S. 45 (1885). It could not acquire any rights in the reserved minerals because they too were not subject to appropriation.

Therefore, it must be held that those mining claims, or portions thereof, located by the Dredge Corporation on land included in leases under the Small Tract Act at the time of the attempted location of the claims are invalid as a matter of record.

Of the land embraced in the claims and classified for small tract disposition by the three classification orders issued prior to the location of the claims, only the two five-acre tracts in Dredge No. 47 were not already under lease at the time of the location of the claim. However, as those two tracts were under oil and gas lease at the time of the location, that claim, too, is null and void in toto.

The record discloses that a portion of Dredge No. 51, the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 11, T. 21 S., R. 60 E., was not even classified for small tract purposes until October 2, 1953,⁵ and that at the time the claim was located this land was open to the operation of the mining laws. Since the records of the Department do not show that that portion of the claim is void *ab initio*, it will not be declared invalid on the basis of the present record. The Director's decision declaring Dredge No. 51 to be null and void as to this quarter-quarter section is reversed.

The appellant has requested that it be given the opportunity to present oral argument in support of this appeal. However, as it has been determined that most of the land embraced in appellant's claims was not open to the operation of the mining laws when the claims

⁵ Nevada Small Tract Classification No. 95, 18 F. R. 6413.

were located, no useful purpose would be served by the presentation of oral argument. Accordingly, the request is denied. (43 CFR, 1956 Supp., 221.36.)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management dated October 3, 1956, is, for the reasons set forth above, affirmed in part and reversed in part.

EDMUND T. FRITZ,
Deputy Solicitor.

SCHEDULE

Date of Location	Name of Claim	Description (All in R. 60 E.)	Rev. Misc. No.
7-14-52	Dredge No. 17.....	NE $\frac{1}{4}$ Sec. 33, T. 20 S.....	*95-1
7-14-52	Dredge No. 18.....	NW $\frac{1}{4}$ Sec. 33, T. 20 S.....	*95-2
7-14-52	Dredge No. 20.....	SW $\frac{1}{4}$ Sec. 33, T. 20 S.....	95-3
7-17-52	Dredge No. 21.....	NE $\frac{1}{4}$ Sec. 3, T. 21 S.....	98-3
7-17-52	Dredge No. 22.....	NW $\frac{1}{4}$ Sec. 3, T. 21 S.....	98-4
7-17-52	Dredge No. 23.....	SE $\frac{1}{4}$ Sec. 3, T. 21 S.....	98-5
7-17-52	Dredge No. 24.....	SW $\frac{1}{4}$ Sec. 3, T. 21 S.....	98-6
7-17-52	Dredge No. 25.....	NE $\frac{1}{4}$ Sec. 4, T. 21 S.....	†99-1
7-17-52	Dredge No. 26.....	SE $\frac{1}{4}$ Sec. 4, T. 21 S.....	99-2
7-17-52	Dredge No. 27.....	SW $\frac{1}{4}$ Sec. 4, T. 21 S.....	99-3
7-21-52	Dredge No. 46.....	NW $\frac{1}{4}$ Sec. 12, T. 21 S.....	†103-1
7-21-52	Dredge No. 47.....	SW $\frac{1}{4}$ Sec. 12, T. 21 S.....	†103-2
7-21-52	Dredge No. 48.....	NE $\frac{1}{4}$ Sec. 11, T. 21 S.....	†102-1
7-21-52	Dredge No. 49.....	NW $\frac{1}{4}$ Sec. 11, T. 21 S.....	102-2
7-21-52	Dredge No. 50.....	SE $\frac{1}{4}$ Sec. 11, T. 21 S.....	†102-3
7-21-52	Dredge No. 51.....	SW $\frac{1}{4}$ Sec. 11, T. 21 S.....	102-4

*Declared null and void by the manager only as to that land included in the claim which had been classified for small tract disposition prior to the date of location.

†Declared null and void by the manager as to that land included in the claim embraced in oil and gas leases at the date of location.

APPEAL OF WEARDCO CONSTRUCTION CORPORATION

IBCA-48

Decided September 30, 1957

Contracts: Changed Conditions—Contracts: Changes and Extras—Contracts: Damages: Unliquidated Damages—Contracts: Delays of Government—Contracts: Suspension and Termination

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in fur-

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nishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

BOARD OF CONTRACT APPEALS

Weardeco Construction Corporation, of Montebello, California, has filed an appeal, dated August 6, 1955, from the findings of fact and decision of the contracting officer, dated July 12, 1955, denying a claim for additional compensation in the amount of \$1,429.57.¹

The claim arises under a contract with the Bureau of Reclamation for the construction and installation of certain structures and facilities along the Friant-Kern Canal, Central Valley Project, California. The contract is on U. S. Standard Form 23 (Revised March 1953), incorporates the General Provisions of U. S. Standard Form 23A (March 1953) and the further provisions set out in Specifications No. 200C-266, is dated December 14, 1954, and bears the designation No. 14-06-200-3828. The claim is based on the ground that additional costs were incurred by appellant as a result of delays in the performance of the contract work brought about by failure of the Government to furnish promised material on time. It was denied by the contracting officer on the ground that it was a claim for breach of contract which he had no authority to consider or settle.

Paragraph 16 of the specifications of the contract provided that all work under the contract should be completed within 90 calendar days from the date when notice to proceed was received by appellant, and paragraph 17 provided that liquidated damages at the rate of \$25 per day should be payable to the Government for each calendar day's delay in completion of the work. The notice to proceed was received by appellant on December 27, 1954, and the completion date for the contract work thereby became March 27, 1955. The work required by the contract was not completed until April 26, 1955, which was 30 days after the date established by the notice to proceed. However,

¹ The claim, as first advanced, was in the amount of \$3,778.75, but this was subsequently reduced by the contractor to \$1,535.30, of which one item, in the amount of \$105.73, was ultimately allowed administratively on the ground that it was for extra work required by the Government.

because of the extension of time hereinafter mentioned, no liquidated damages became payable.

The contract required, among other things, that appellant install at two separate locations certain devices for measuring the flow of water known by the name of "venturi meters." Paragraph 18 of the specifications provided that the tubes of the meters, as well as various other components, would be furnished appellant by the Government, but did not fix any specific time for their delivery. The contracting officer, in the decision appealed from, found that the Government failed to furnish the venturi tubes in sufficient time to permit appellant to pursue its work under the contract in orderly sequence, and that this failure delayed the progress of the work for at least 30 days.² He further found that the late delivery of the venturi tubes was an "act of the Government" that constituted an excusable cause of delay within the meaning of clause 5 of the General Provisions of the contract. This clause provides that liquidated damages shall not be charged because of "any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, * * * acts of the Government, in either its sovereign or contractual capacity * * *." The contracting officer, accordingly, extended the time for performance of the contract by 30 calendar days, that is to say, to the same date on which the work was actually completed.

Appellant contends that the delay of the Government in furnishing the tubes for the venturi meters entitles it, not merely to the extension of time allowed by the contracting officer, but also to an increase in the contract price. Appellant says that this delay caused it to incur a number of items of expense in performing the contract work which it would not have had to incur if the tubes had been available at the time when their installation first became possible. The items of expense are described as being for "additional moves of crane necessitated by lack of material," "additional rental paid on D-6 Caterpillar Bulldozer," "additional amount paid to Superintendent awaiting delivery of material," "Superintendent not supervising amount of work * * * possible due to the fact pipe laying operations ceased," and "additional equipment charges." Finally, appellant points to clause 4 of the General Provisions, which provides for the allowance of an equitable adjustment in the event a "changed condition" is encountered during the course of the contract work, and argues that the unavaila-

²The statements made by the contracting officer indicate that the venturi tubes were not delivered until 49 days after the date when appellant first became in a position to install one of them, but, since all work under the contract was completed within 30 days after the date established by the notice to proceed, the contracting officer evidently considered that no occasion existed for determining whether the orderly pursuit of the work had been delayed for more than 30 days by the late delivery of the tubes.

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bility of the venturi tubes at the time when appellant was ready to install them constituted a "changed condition" within the meaning of that clause.³

The contracting officer ruled that the unavailability of the tubes did not constitute a "changed condition" under clause 4, and the Board considers that this ruling was correct. The clause in question states that the Contractor shall notify the Contracting Officer in writing of "(1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract"; and that the Contracting Officer "shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made." The conditions referred to in both of the numbered items of this clause are "physical conditions at the site," and it seems rather obvious that the failure of the Government to make timely delivery of a piece of equipment is not a "physical condition at the site."

Appellant seeks to avoid the logic of this reasoning by suggesting that clause 4 should be read as being not confined in its application to the situations described in the two numbered items, but as encompassing any material change in conditions that occurs with respect to a contract. This suggestion, however, is clearly inconsistent with the language of the clause, which in precise terms defines *two particular conditions*, and then goes on to prescribe that for *such* conditions an equitable adjustment shall be made. Had the clause been intended to extend to any occurrence whatever that might, in ordinary parlance, be fairly characterized as a changed condition, there would have been no reason to incorporate in it the much narrower definition of what the clause is intended to cover set forth in items (1) and (2).

³ The full text of clause 4 is as follows:

"The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof."

These considerations are reinforced by the requirement that written notice of the two described conditions be given by the contractor "before such conditions are disturbed," and by the prohibition against the allowance of "any claim of the Contractor for adjustment hereunder" unless "notice as above required" has been given by the contractor or waived by the contracting officer. The word "disturbed" fits situations where there are changed physical conditions at the site of the work, but not situations where the condition encountered is a delay on the part of the Government, and its use, therefore, imports that the latter were not in mind. The fact that "any claim" is to be allowed only if the required notice is given or waived indicates that the entire clause is confined in its application to those conditions that are the subject of the notice requirement, namely, the conditions described in the two numbered items.

The Board is aware of no precedent which would support the contention that failure of the Government to make timely delivery of promised material is a situation that comes within the purview of the "changed conditions" clause of the standard form Government contracts. On the contrary, the accepted construction of that clause has been, generally speaking, to the effect that only physical conditions at the site are within its meaning and intent.⁴ In line with that construction it has been specifically held that delay by the Government in furnishing promised equipment, or in otherwise performing its contractual obligations, is not a situation to which the "changed conditions" clause applies.⁵ While it is true that the language of the present version of Clause 4 differs in some respects from the language of the prior versions that were the subject of the decisions here cited, the present version is tied to physical conditions at the site by wording that is more, not less, explicit than that used in its predecessors.

Moreover, even if there were merit to the contention that the delay of the Government in furnishing the venturi tubes constituted a "changed condition" within the meaning of clause 4, there would still be no basis for the allowance of additional compensation under the equitable adjustment provisions of that clause. In *United States v. Rice*, 317 U. S. 61 (1942), the Supreme Court held that those provisions, as well as the comparable provisions for equitable adjustments on account of "changes" contained in clause 3 of

⁴ The Supreme Court has stated that "Article 4, entitled 'Changed Conditions,' governs the procedure under which the Government may alter the contract to meet unanticipated physical conditions," *United States v. Rice*, 317 U. S. 61, 66 (1942). See also *Hallman v. United States*, 107 Ct. Cl. 555 (1946) and 112 Ct. Cl. 170 (1948); *McLaughlin-Incorporated*, IBCA-18 (January 13, 1955); *Ingalls Shipbuilding Corp.*, Eng. C&A No. 569 (March 9, 1954); *Gerwick-Morrison-Twatts*, ASBCA Nos. 130, 132, 133 (April 24, 1952).

⁵ *Tucker McClure*, ASBCA No. 193 (August 31, 1950).

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the standard form contracts, entitle a contractor to an extension of time, but not to an increase in compensation, where performance of the contract is delayed by reason of circumstances that come within the purview of either of those clauses. The Court said:⁶

* * * It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration of price, and that "an increase or decrease * * * in the time required" should be met with alteration of the time allowed; for "increase or decrease of cost" plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision. The provision as to time serves the large purpose of removing from persons in the position of respondent liability for "delay" beyond the stipulated date for which they might otherwise have their contract terminated or might be required to pay liquidated damages without fault.

* * * It does not help to argue that the changes made under clause 4 "are not within the contemplation of either party," since the changes made under clause 3 are also not contemplated in advance. Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract. For delays incident to such unanticipated changes, the contractor was, under either section, to be granted a "compensating extension of time." *Wells Bros. Co. v. United States*, *supra* [254 U. S. 83], 86.

In this case there were two consequences of the discovery that the Home could not be built as originally planned. One was an alteration of specifications, which resulted in a slight cut in respondent's outlay and in its compensation. The other was the delay itself, and for this the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. Under the terms of the contract, it is entitled to no more.

The items of expense for which additional compensation is claimed by appellant appear to have been incurred solely because of the failure of the Government to have the venturi tubes ready when needed. These alleged costs are thus consequential damages flowing from delay, for which additional compensation would not in any event be allowable under clause 4, as interpreted by the Supreme Court.

In supplemental findings of fact, dated May 24, 1957, the contracting officer examined, at the request of the Board, the further question whether the claim here presented would be allowable under either the "changes" provision—clause 3 of the General Provisions—or the "suspension of work" provision—paragraph 11 of the General Conditions—of the contract. His conclusion was that the claim did not fall within the range of either of those provisions.

⁶ At pp. 67-69.

The Board is unable to find in the facts of this case any basis for applying clause 3 of the General Provisions. That clause provides for the allowance of equitable adjustments in the contract price or time when "changes in the drawings and/or specifications" are made by the contracting officer. From the record in the present case it seems quite clear that the unavailability of the venturi tubes caused appellant to make a shift in the sequence of operations it had planned to follow, and ultimately led to a cessation of all work under the contract. It seems equally clear, however, that such shift and such cessation were not attributable to any acts or omissions of the Government, or its representatives, other than the delay in making the venturi tubes available. The sequence of operations actually followed by appellant after it learned that the tubes were not available was not inconsistent with any requirement of the contract, and, therefore, the acquiescence of the representatives of the Government in the shift was not itself a change within the meaning of the "changes" provision. The alleged order of the contracting officer that the portion of the job which involved interference with the Friant-Kern Canal be completed by February 1, 1955, was likewise not a change, for the performance of this portion of the job by that date was expressly required by the contract, and did not necessitate availability of the tubes.

Reduced to fundamentals, appellant's claim is that by the delay in furnishing the venturi tubes the Government broke its contractual obligations and thereby made more costly appellant's performance of its own obligations under the contract. Clause 3 was not designed as a mechanism for the adjustment of claims for breach of contract, and the rule of the *Rice* case that time, not money, is the measure of equitable adjustments for delay, applies to it as well as to clause 4.⁷

The contracting officer was also correct in deciding that appellant's claim for additional compensation could not be allowed under paragraph 11 of the General Conditions. That clause reads as follows:

The Government may at any time suspend the whole or any part of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension, it being understood that expenses will not be allowed for such suspensions when ordered by the Government on account of weather conditions.

In the first place, there is no showing that the work was stopped because of any order or request made, or action taken, by a Government official with the intent, or in the belief, that the work should be stopped,

⁷ *Armond Cassil, Inc.*, ASBCA No. 438 (June 8, 1950); *Chas. H. Tompkins Co.*, ASBCA No. 570 (April 27, 1950); *Leo Sanders*, Army BCA No. 1468, 4 CCF, par. 60,526 (1948).

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and no justification for a determination that a stoppage of the work would have been for the convenience or in the interest of the Government. What happened simply was that when appellant found that the venturi tubes would not be available when it wanted them, it changed, on its own initiative, its planned schedule of operations so that it could accomplish without the tubes as much of the work as it considered feasible to do in their absence, and then, with the acquiescence of the Government representatives, stopped work entirely until the tubes arrived. The record does not show why delivery of the tubes was delayed, and it may have been because of circumstances that were beyond the control of the Government. If the Government was responsible for the delay, the case would be more in the nature of a failure by the Government to perform its contractual duty of supplying the tubes than of an exercise by the Government of its contractual right to suspend the work, and if the Government was not responsible for the delay, its conduct was not the cause of the stoppage of work that ensued.

In the second place, the "suspension of work" clause contained in this contract does not grant to the contracting officer, either expressly or by necessary implication, the authority to make an equitable adjustment in the contract price in order to compensate a contractor for expenses incurred because of a suspension of work directed or required by the Government. The reference in that clause to "actual, reasonable, and necessary expenses due to delays, caused by such suspension" appears to be for the purpose of saving to the contractor the right, which a reservation of suspension authority by the Government would otherwise cause him to lose, of recovering *through court proceedings* such damages as he may have sustained by reason of a suspension order, and not to be for the purpose of creating a basis for the administrative assessment of those damages. It contains no provision comparable to the affirmative authorization for the making of an equitable adjustment by the contracting officer which appears in some of the other forms of "suspension of work" clauses used by Government agencies.

The views expressed above are in line with prior rulings concerning the effect of a "suspension of work" clause couched in the terms of paragraph 11.⁸

In the last analysis, the question presented by the instant appeal is whether in the circumstances here involved an award of additional compensation is authorized by any of the provisions of the contract.

⁸ *Electric Engineering and Construction Service, Inc.*, 63 I. D. 75 (1956); *Parker-Schram Company*, CA-152 (March 5, 1952); see *Harwood-Nebel Construction Co., Inc. v. United States*, 105 Ct. Cl. 116, 128-56 (1945).

The answer to that question must be in the negative. On the other hand, appellant seems to assert that, if it is not entitled to additional compensation *under* the contract, then it must be entitled to additional compensation for breach of contract. Here appellant appears to have in mind decisions in which the Court of Claims has held that where the Government negligently fails to make timely delivery of promised material, and thereby unduly delays performance of the contract work, the extra costs incurred as a result may be recovered by the contractor in a suit against the Government for breach of contract.⁹ But those decisions do not mean that administrative officers of the Government, such as the contracting officer or the Board, are authorized to consider and settle unliquidated damage claims of this sort for which no provision is made in the contract itself. Quite to the contrary, it is well established that the powers conferred on administrative officers by the standard Government contract forms do not extend to the allowance of claims for unliquidated damages on account of alleged breach of contract.¹⁰ The contracting officer accordingly was right in concluding that, absent any ground for the allowance of additional compensation *under* the contract, the instant claim must be regarded as one for breach of contract which he did not have authority to consider or settle. Since the Board lacks jurisdiction to determine the merits of a claim of this character, no opinion is expressed upon the question whether the delay in furnishing the venturi meter tubes was caused by such a want of diligence, or other fault, on the part of the representatives of the Government as would amount, in the circumstances of this case, to a breach of contract.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decision of the contracting officer are affirmed.

HERBERT J. SLAUGHTER, *Member*.

I concur:

THEODORE H. HAAS, *Chairman*.

Board member WILLIAM SEAGLE, who is on leave, did not participate in the disposition of this appeal.

⁹ *Thompson v. United States*, 130 Ct. Cl. 1 (1954); *Chalender v. United States*, 127 Ct. Cl. 557 (1954); *Harwood-Nebel Construction Co., Inc. v. United States*, 105 Ct. Cl. 116 (1945).

¹⁰ *Wm. Cramp & Sons v. United States*, 216 U. S. 494 (1910); *Continental Illinois Nat'l Bank & Trust Co. v. United States*, 126 Ct. Cl. 631, 640-41 (1953); *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 329-30 (1948); *Langevin v. United States*, 100 Ct. Cl. 15, 29-31 (1943); *A. S. Horner Construction Co.*, 63 I. D. 401 (1956).

*September 23, 1957***WILBERT PHILLIPS****FLETCHER G. EDWARDS****A-27470***Decided September 23, 1957****Rules of Practice: Appeals: Statement of Grounds**

Where on appeal to the Director, Bureau of Land Management, from a decision of a manager of a land office the appellant files a statement of the reasons for the appeal with the land office manager, within the 30-day period required for filing the statement, but the statement is not received by the Director until the 30-day period has expired, the appeal is properly dismissed since the pertinent rules of practice provide that a statement of reasons, if not filed with the notice of appeal, must be filed "in the office of the Director" within 30 days after the notice of appeal is filed.

Rules of Practice: Appeals: Timely Filing

Where under the Department's rules of practice a document is required to be filed in the office of the Director, Bureau of Land Management, the document is not considered filed until such time as it is actually received in the Director's office, and a document filed in a land office is not considered filed in the office of the Director.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Wilbert Phillips and Fletcher G. Edwards have appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated January 29, 1957, which dismissed their appeal to the Director from the decision of the manager of the land office at Cheyenne, Wyoming, dated November 1, 1956, holding that oil and gas lease Buffalo 039100 had terminated by operation of law on August 31, 1956.

The appeal was dismissed on the ground that the appellants had failed to file a statement of the reasons for the appeal within the time allowed by the Department's rules of practice (43 CFR, 1956 Supp., Part 221).

The applicable rules of practice provide that a person wishing to appeal to the Director must file "in the office of the officer who made the decision" a notice of his intention to appeal within 30 days after the person taking the appeal received the decision he is appealing from. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make. 43 CFR, 1956 Supp., 221.2.

*Out of chronological order.

43 CFR, 1956 Supp., 221.3 provides:

If the notice of appeal did not include a statement of the reasons for the appeal, such a statement must be filed *in the office of the Director* within 30 days after the notice of appeal is filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal as provided in § 221.98. * * * [Italics supplied.]

Section 221.98 provides that:

An appeal to the Director or to the Secretary will be subject to summary dismissal by the officer to whom it is made for any of the following causes:

(a) If a statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required * * *.

The record shows that the appellants filed their notice of appeal on November 30, 1956, in the Cheyenne, Wyoming, land office. This was the office of the officer rendering the decision from which the appeal was being taken. The notice of appeal did not contain a statement of the reasons for the appeal. Consequently, the appellants were required by the rules of practice to file a statement of the reasons for the appeal in the office of the Director on or before December 31, 1956 (the 30th day, December 30, being a Sunday). The record shows that on December 14, 1956, the Director's office addressed a letter to the attorney for the appellants specifically calling his attention to the provisions of 43 CFR, 1956 Supp., 221.3. On December 28, 1956, the appellants' statement of reasons was filed in the Cheyenne land office. The statement of reasons was forwarded by the land office to the Director, but did not reach the Director's office until January 4, 1957, after the 30-day period had expired.

In their appeal to the Secretary the appellants contend that their statement of reasons was timely filed in that it was filed within the 30-day period with the manager of the Cheyenne land office; that the manager acted as the Director's agent in receiving the statement and recognized his responsibility by forwarding the document to the Director; and that the reason the document did not reach the office of the Director within the time allotted by the rules of practice was due to the delay of the manager's office in forwarding it.

The appellants' argument is without merit. The provisions of 43 CFR 221.3 are written in clear, simple and unambiguous language. The regulation plainly states that if the statement of reasons is not included in the notice of appeal it must be filed "in the office of the Director" within 30 days after the notice of appeal is filed. Obviously, no one could possibly conclude from this language that filing the required document in the manager's office in Cheyenne constitutes filing "in the office of the Director", which is in Washington, D. C., particularly when the language is contrasted with that in the immedi-

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ately preceding rule (sec. 221.2), which requires the notice of appeal to be filed "in the office of the officer who made the decision" appealed from. Moreover, it should be noted that as a courtesy the office of the Director specifically reminded the appellants of the provisions of 43 CFR 221.3 on December 14, 1956. The reminder came directly from Washington, D. C.

The Department has held on several occasions that where an appeal was filed in a land office of the Bureau of Land Management within the 30-day period allowed for the filing of appeals to the Secretary by the rules of practice in effect prior to the revision of 43 CFR, Part 221, which became effective on May 1, 1956, but the appeal did not reach the proper office in Washington until after the expiration of the 30-day period, the appeal was not timely filed and would be dismissed. *David R. Daniel, Melvin R. Taylor*, A-27335 (July 16, 1956); *R. L. Greene et al.*, A-27181 (May 11, 1955), and cases cited therein. Also, the current rules of practice provide that a document is "filed" in the office where the filing is required when it is received by a party authorized to receive it (43 CFR, 1956 Supp., 221.92). The appellants' statement of reasons must be held under this regulation to have been filed on January 4, 1957, at 10 a. m., the date and time it was received in the office of the Director in Washington, D. C.

The short answer to the appellants' contention that the manager acted as the Director's agent in receiving the statement of reasons is that the manager is not designated under the rules of practice to act as the Director's agent. If he is to be considered anyone's agent, he merely acted as the appellants' agent in forwarding the document to the office in which it was required to be filed. *Of: C. B. Eaton et al.*, A-26762 (August 11, 1953).

As the appellants did not file a statement of the reasons for their appeal within the time allowed by the Department's rules of practice, the appeal was properly dismissed. *Charles J. Brady v. George M. Kitchen*, A-27461 (June 26, 1957).

Therefore, pursuant to the authority delegated to the Solicitor, by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF IDEKER CONSTRUCTION COMPANY**IBCA-124***Decided October 3, 1957***Contracts: Damages: Unliquidated Damages—Contracts: Delays of Government**

A claim of a clearing contractor for additional compensation because of increased costs of performance, and because of a reduction in the sales price of improvements disposable by the contractor under the terms of the contract, which resulted from delays by the Government in furnishing possession of such improvements is based on a breach of contract, and may not be administratively determined.

Contracts: Changes and Extras—Contracts: Acts of Government

A claim of a clearing contractor for additional compensation because of a shortage of marketable materials, which it had a right to dispose of under the terms of the contract, may be allowed under the "changes" article of the standard form of Government construction contract when the shortage was due to conduct of the Government that reduced the quantum of the clearing work to be done by the contractor. The contractor, however, would not be entitled to additional compensation if such missing materials were not within the scope of the clearing work to be done under the contract, or were removed without the sanction of the Government after the passing of title to the contractor.

BOARD OF CONTRACT APPEALS

This decision disposes of a timely appeal from findings of fact and decision of the contracting officer dated May 20, 1957, denying certain claims for additional compensation under Contract No. 14-06-701-2128, dated April 2, 1956, between the United States and Ideker Construction Company. The contract provided for clearing Lovewell Reservoir Site under the schedule of Specifications No. 701C-396, for Bostwick Division, Missouri River Basin Project, Bureau of Reclamation, and fixed a lump-sum price for its performance. The contract was on standard form No. 23 (revised March 1953) and incorporated the General Provisions of standard form No. 23A (March 1953). Notice to proceed with the work was received by the contractor on April 13, 1956, and a period of 172 days was allowed for completion. Although the contract was not completed until December 15, 1956, sufficient extensions of time were granted to relieve the contractor from the payment of any liquidated damages.¹

In its release on contract dated January 16, 1957, the contractor reserved three claims in the total amount of \$10,815. The findings of fact from which an appeal has been taken denied all of these claims, save for one item of claim III, on the ground that they were claims

¹ Findings of fact dated October 30, 1956.

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for unliquidated damages for breach of contract which the contracting officer had no authority to consider or adjust under the terms of the contract. The remaining item, amounting to \$500, was based upon the cost of removing fencing not provided for by the specifications, and was allowed in full.

The contractor in its brief filed July 8, 1957, states, among other things, that none of the items for which added compensation is sought were mentioned in the specifications or were of such a nature as could have been reasonably foreseen. Nevertheless, unless there is a provision in the contract permitting the adjustment of such claims, they would not be cognizable by the Board.

I

The first claim is for additional expenses, in the amount of \$2,250, allegedly due to delays by the Government in furnishing possession of farmsteads, buildings, and fences on the area to be cleared. Such delays, it is contended, resulted in the contractor incurring increased costs in performing work required by the contract, and also a loss of opportunity to make advantageous sales of certain buildings, which, under paragraph 30 of the specifications, were to become the property of the contractor.

Paragraph 16 (b) of the specifications, which dealt with the order of prosecution of the work, stated that "it is anticipated that entry for clearing all timber and improvements may be made on or after March 15, 1956," for a large portion of the clearing area, and specified later dates for the remaining portions. This provision being in terms of anticipation or expectation, it might be questioned whether it constituted a definite commitment that possession would be delivered on or before the dates named. However, even if the contract clearly and unequivocally provided for entry or possession by a specified date, this Board would not be authorized to determine the claim here asserted. It is well settled that a claim for additional compensation based on the alleged delay of the Government in performing its contractual obligations is a claim for a breach of contract, which is beyond the authority of an administrative official, such as the contracting officer or this Board, to determine.²

II

The second claim is for additional compensation in the amount of \$2,065 which the contractor asserts to be due on account of an alleged shortage of marketable materials.

² *Weardco Construction Corporation*, 64 I. D. 376 (1957) and cases there cited; *Norair Engineering Corporation*, ASBCA No. 3527, 57-1 BCA par. 1283 (1957) and cases there cited.

Paragraph 30 of the specifications provided that all of the existing improvements within the area to be cleared should, with certain enumerated exceptions, become the property of the contractor. It also provided that the contractor should remove and dispose of, at its own expense, all but the excepted improvements, and that no gains or losses due to sales of marketable materials salvaged by the contractor would be deducted from or added to the contract price. The drawings made a part of the contract contained detailed lists of the improvements at each farmstead within the clearing area. In addition, the contract included "Schedule Supplement Sheets" that listed the major improvements, such as houses and barns. Paragraph 30 of the specifications required that these major improvements be removed from the premises, and prohibited their being disposed of by burning, or other means, while remaining on Government land.

The contractor contends that it did not receive all of the marketable materials to which it had a right under the terms of Paragraph 30. The factual situation involved, as viewed by the Government, is described by the Department Counsel in the following words:

Some of the items which the contractor complains were missing were shown on the lists of improvements set forth on the maps, and certain of the missing improvements were not specifically so noted. In certain cases it appears that the landowners, as a part of agreements or understandings under which the property was acquired by the Government, had been permitted to remove certain of the missing improvements. In other cases it appears that improvements complained of by the contractor as being missing may have been removed by the former landowners without permission, or were removed by unknown third parties. In some cases, the improvements in controversy apparently were on the property when the tracts were released to the contractor, and if removed without the contractor's consent, the removal was by unknown third parties.

On the basis of the foregoing statements, the Board is of the opinion that the claim here in question cannot be considered, at least in its entirety, as being a claim which the contracting officer would have no authority to determine under the terms of the contract. One of those terms is the "changes" article—clause 3 of the General Provisions—which provides for the making of an equitable adjustment by the contracting officer when "changes in the drawings and/or specifications" are made by him or his authorized representatives. Boards of contract appeals have consistently given a broad construction to the "changes" article, and have frequently held that under its provisions additions to or deletions from the contract work, when made at the instance of authorized Government officials, call for a corresponding adjustment, which may be either upward or downward, of the contract price.³

³ Cuneo, "Extra Work Under Federal Government Construction Contracts," 24 *Fordham L. Rev.* 556, 571-74 (1955-56), and cases there cited, particularly in footnotes 62 and 65.

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To the extent to which the Government in the present case failed to make available to the contractor improvements which under the terms of the contract were to be removed or disposed of by the contractor, it could properly be said that the Government changed the quantum of the work to be done under the contract and, thereby, created a basis for the making of an equitable adjustment under the "changes" article.⁴ This equitable adjustment would be measured by the difference between the saving which accrued to the contractor because it did not have to remove or dispose of the missing improvements and the loss which the contractor sustained because it could not sell the missing improvements, and would be in favor of the Government if the saving exceeded the loss and in favor of the contractor if the loss exceeded the saving. The distinction between the situation here presented and cases such as *Paul Jarvis, Inc.*⁵ is that in the latter the alleged wrongful conduct of the Government made the performance of the contract work more expensive but did not alter its quantum or its characteristics, as defined by the specifications and drawings.

For the purposes of the "changes" article, it would not seem to make any difference whether the absence of particular improvements was due to agreements or understandings between the Government and former landowners or was due to unauthorized acts of former landowners or unknown third parties, if the particular improvements were covered by the terms of the contract and were not on the land at the time when the Government made it available to the contractor for clearing.

In the event any of the improvements alleged to be missing were not within the scope of the clearing work to be done under the contract, or were removed without the sanction of the Government after the passing of title to the contractor, then it would appear that, as to such improvements, the contractor would not be entitled to additional compensation under the "changes" article or any other provision of the contract.

In the circumstances, therefore, the decision of the contracting officer with respect to the claim for shortage of marketable materials must be reversed, and the claim must be remanded to the contracting officer for determination in accordance with the principles set forth in this opinion. If his determination is not acceptable to the con-

⁴ See *Farwell Company, Inc. v. United States*, Ct. Cl. No. 282-52 (March 6, 1957); *H. B. Nelson Construction Co. v. United States*, 87 Ct. Cl. 375, 383-86 (1938), cert. denied 306 U. S. 661 (1939); *R. E. Cotton Co., Inc. v. United States*, 87 Ct. Cl. 563 (1938); *Appalachian Flooring Co.*, ASBCA No. 2927 (February 3, 1956); *Walter J. Harding, Jr.*, ASBCA No. 2477 (February 2, 1955); *American Construction Company*, W. D. BCA No. 583 (November 22, 1944).

⁵ 64 I. D. 285 (1957).

tractor, a further appeal may be taken to the Board within the 30 days allowed by the "disputes" article of the contract.

III

The final claim is for additional expenses, in the amount of \$6,000,⁶ due to alleged delays and changed conditions.

Except for one item, this claim is predicated upon alleged delays of the Government either in awarding the contract, in giving work orders, or in making available various tracts included in the area to be cleared. While the contractor seems to argue that the delays resulted in "changed conditions," it is quite clear that this is not the case, if the term be used in its legal sense, for the authorities are plainly to the effect that delays of the Government do not come within the "changed conditions" provision of the standard form of Government construction contract.⁷ As the subject contract contains no provision for adjustments in the contract price due to delays attributable to the Government, these delay items, like those of claim I, constitute a claim for breach of contract that would be beyond the authority of the contracting officer or this Board to determine.

The remaining item of claim III, in the amount of \$1,000, appears to be predicated on the ground that the contractor's work was made more expensive by a large and continuous flow of water at Mile No. 1 of the clearing area. The contractor asserts that the flow was not a natural one and could have been controlled by the Government, but the circumstances leading to these assertions are not explained. In any event, the contractor has not alleged any facts which, if proved, would warrant a determination that the contracting officer erred in finding this item to be a claim for breach of contract. Hence, it must be concluded that the claim, as presented, is not a proper subject for administrative determination.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the contracting officer upon claims I and III is affirmed, and, with respect to claim II,

⁶ After deduction of the \$500 item allowed by the contracting officer.

⁷ *Weardco Construction Corporation*, 64 I. D. 376 (1957).

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his decision is reversed and the claim remanded for determination in accordance with the principles set forth in the Board's opinion.

THEODORE H. HAAS, *Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

Board member WILLIAM SEAGLE, who is on leave, did not participate in the determination of this appeal.

CONSTRUCTION OF RECORDING REQUIREMENT OF SECTION 4, ACT OF AUGUST 11, 1955 (69 STAT. 681; 30 U. S. C. SEC. 623)

Statutory Construction: Generally

The rule that where no penalty is provided in a statute, none can be assessed is not universal. It must be weighed in the light of the language of the statute granting a right or imposing an obligation. In particular, statutes dealing with the public lands place a responsibility upon the Secretary to see that they are enforced. Even though they have neglected to specifically fix that responsibility in him, it falls there naturally because of general statutes vesting authority in him over the public lands.

Statutory Construction: Legislative History

When the question arises whether a statute is mandatory or directory it is necessary to determine the intent of Congress and, when resort to the legislative history shows not only that the purpose to be served requires a construction that the statute is mandatory but evidence of a positive intent to make it so, it must be treated as such.

Mining Claims: Title—Statutory Construction: Generally

The general rule that a statute may not be retroactively construed so as to affect vested possessory rights or titles is not applicable to recording statutes provided a reasonable time is allowed for recording.

M-36429

OCTOBER 30, 1957.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

In your memorandum of February 25, you have asked whether it is necessary for the owner of a valid mining claim, located prior to the date of the above act [Act of August 11, 1955, 69 Stat. 681] and prior to a subsequent withdrawal of the land for power purposes or after restoration of the land from withdrawal under section 24 of the Federal Power Act (41 Stat. 1075, as amended 16 U. S. C. sec. 818), to file for record a copy of the notice of the location of his claim as required by section 4 of the act of August 11, 1955 (69 Stat. 681; 30 U. S. C. sec. 623), and whether, if he does not, his claim may be forfeited or declared null and void. You also ask whether if a location

was made on unrestored, withdrawn land, the filing for record of the location notice would make the claim valid.

Your inquiry was prompted by protests against the inclusion in the regulations under the act of the following:

* * * Section 4 applies to unpatented locations for lands referred to in section 185.103 only if:

- (1) The location was made on or after August 11, 1955, or,
- (2) The location was made prior to August 11, 1955, and prior to the withdrawal or reservation of the lands for power purposes, or
- (3) The location was made prior to August 11, 1955, on lands while they were withdrawn or reserved for power purposes but after such lands had been opened or restored to location only pursuant to a favorable determination by the Federal Power Commission under section 24 of the Federal Power Act. [21 F. R. 8946.]

The objection went to clauses (2) and (3), and the reason for it was stated to be that

To interpret section 4 as imposing forfeiture penalties for noncompliance would, as to claims located after enactment, violate the statutory construction rule that noncompliance gives rise only to such penalty results as are specified, and also would, as to valid claims located prior to enactment * * *, add new limitations and restrictions contrary to the express language of section 5 and thus violate vested rights.

The proposed regulations do not prescribe any penalty nor does the law. However, they state that the copy of the notice "must" be filed while the act says it "shall" be filed. With this exception, the regulation contains no requirement that is not also contained in the act. It is suggested that the word "shall" be substituted in the regulations for the word "must" where the latter is used as above indicated.

Notwithstanding the absence of any penal provision in the particular law itself, there is authority elsewhere in the statutes which applies, and it is my opinion that it is necessary for the mining claim owners specified in section 4 to file their notices of location. Compliance with this requirement will not result in limiting or restricting the rights acquired by location. Those rights are expressly reserved from limitation or restriction by section 5 which, in terms, provides that nothing in the act "shall be construed to limit or restrict the rights of the owner or owners of any valid mining claim located prior to the date of withdrawal or reservation." The claims are not necessarily thereby reserved from extinction because "limit or restrict" is to restrain within bounds, to confine. Neither word means "to destroy or prohibit." *Dart v. City of Gulfport*, 113 So. 441 (Miss., 1927).

The question hinges to some extent upon whether the provision is mandatory or directive. To determine that it is necessary to ascertain the intent of Congress in enacting it. *American Automobile Ins. Co. v. Freundt*, 103 F. 2d 613 (Ill., 1939); *Vaughan v. John C. Winston*, 83 F. 2d 370 (Okla., 1936). A reasonable construction rather than

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one rendering the statute absurd must be given. *Vaughan v. Winston*, *supra*. And, where mandatory construction is necessary to make a statute operate, it must be given. *Territory v. Canvassing Board*, 5 Alaska 602 (1917); *Stiner v. Powells Valley Hardware Co.*, 75 S. W. 2d 406 (Tenn., 1934); 82 C. J. S. 376.

The statute is mandatory in form. The word "shall" when used in a statute

* * * is generally imperative or mandatory; [and the ordinary meaning of language should always be favored. *Minor v. Mechanics Bank of Alexandria*, 1 Pet. 46] but it may be construed as merely permissive or directory, (as equivalent to "may,"), *to carry out the legislative intention* and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. [Italics added.] Black's Law Dictionary, 2d ed., 1910.

It is never so construed in the face of facts which reasonably appear to require a construction of the word as mandatory, as where it is the essence of the thing required. *Kavanaugh v. Fash*, 74 F. 2d 435 (1934). The facts here appear to bear a stricter interpretation. The word "shall" is used 17 times in the act. In 16 instances, the present one included, there is nothing in the language to indicate that its meaning is directory. Rather, it appears in each of those instances to make a requirement or a prohibition mandatory. In the particular instance, the requirement is coupled with one applicable to locations made after the date of the act. The one exception becomes so because of qualifying language respecting regulations "The Secretary *shall* establish such rules and regulations *as he deems desirable* * * *" [Italics added.] The general presumption is that identical words used in different parts of the same act are intended to have the same meaning. *Courtneil v. Legh*, 4 Exh. 126, 130 (1869); *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433 (1932). As said in the last case, the presumption is not rigid and readily yields where there is such a variance in their use as to justify a different interpretation. With the one exception noted, there is no variance in the 17 uses of the word here and where it is used as here twice in the same sentence, and is clearly mandatory as to locations made after the date of the act, its mandatory character as to prior locations seems evident. The legislative history of the bill (H. R. 100, 84th Cong., 1st sess.) fully supports this conclusion and further shows that failure to record the location will render the claim invalid. The Department's report to the Senate Committee on Interior and Insular Affairs on the bill stated: "We assume that, under section 4 of the bill, failure to record location would render the claim invalid * * *." The Department's report was quoted in full in Senate Report No. 1150, 84th Cong., 1st

sess., on the bill and became a part of that report. Not only did Congress enact section 4 with knowledge of the Department's interpretation but since the same language appears in the letter to the Director of the Budget recommending that the President sign the bill, it appears that the bill was passed by Congress and signed by the President with this assumption in mind. Enactment of the law in the presence of Congress' knowledge of the Department's interpretation of this provision, obvious in its fatal consequences, plus the lack of any evidence of any contrary comment in the Congress not to say action to change the language of the bill is persuasive that "shall" was intended to have the effect that the Department ascribed to it.

Even if the construction given by the Department had not been incorporated in the Committee report and thus adopted by the Committee as its own construction, it would still be entitled to great weight. Thus,

* * * We may accord to the construction expounded during the course of the hearings at least that weight which this Court has in the past given to the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored the particular provisions which it interprets. * * * *Shapiro v. United States*, 335 U. S. 1, 12 (1948).

For although the Department did not draft the bill it did report favorably upon it.

This interpretation is consistent with the theory of Congress in enacting the law. While it was proposed thereby to extend the operation of the mining laws to power site lands, it was, at the same time, the purpose to protect and preserve the Government's potential power resources. Thus, although the act opens certain powersite areas to mining, it takes care to avoid any interference with the use of the land for power purposes. While the "restriction" on the title acquired by a location made under the act applies only to claims located after its date, it must have been obvious to Congress as a minimum that proper enforcement of the law against such claims made it necessary for the land office to have a record of all prior claims. It has long been well recognized in the decisions that lode locations are frequently made so as to conflict with earlier locations on the surface for the purpose of securing the fullest possible extra-lateral rights, and the authority granted to use the surface of the later locations for power use could not be adequately exercised without knowledge of the areas covered by prior locations necessary to avoid trespassing on vested rights by a power permittee. Congress, of course, is aware of this problem which is well portrayed in the decisions of the courts and the Department and other legislation passed by the same Congress recognized the problems resulting from multiple use, e. g., Public Law

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167 [69 stat. 367]. That Congress was concerned with the need to preserve potential powersites is evident from the language in H. Rept. 86, 84th Cong., 1st sess., page 2:

Mineral resource development which appears necessary today must take into consideration preservation of tomorrow's potential sites for hydroelectric power development.

By way of emphasis, the statement was made on the floor of the Senate that it was intended that power rights will be paramount. Cong. Record, July 28, 1955, P. 10217. [101 Cong. Rec. 11830.]

* * * courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy. *Securities and Exchange Comm. v. C. M. Joiner Leasing Corp. et al.*, 320 U. S. 344, 350 (1943).

On page 5 of the same report [H. Rept. 86] it is said that

Section 4 would require owners of *any* unpatented mining claim to file * * * a copy of a notice of location * * *. All claimants would be required to file for record * * * a statement as to the assessment work done * * *. [Italics added.]

Note that the owners of *any* claim are *required* to file copies of location notices and *all* claimants would be required to file proof of assessment work. These two statements can be consistently interpreted only to mean that Congress felt it necessary to have a record of all claims regardless of when they were located.

This conclusion appears at first glance to run counter to two well recognized principles (1) that legislation cannot operate retroactively to adversely affect existing valid rights, and (2) that where the law does not prescribe a penalty none can ordinarily be imposed.

(1) As to the first objection, this is a recording statute. Section 4 provides that the location notice shall be filed for record. It has been often held that filing and recording statutes which retroact upon pre-existing instruments do not violate any constitutional provision, if a reasonable time is given to comply. *Vance v. Vance*, 108 U. S. 514 (1883); *Jackson et dem Hart v. Lamphire*, 3 Pet. (28 U. S.) 280 (1830); *Connecticut Mutual Life Ins. Co. v. Talbot*, 14 N. E. 586 (Ind., 1887). They do not impair the obligation of contracts. *Knights of Maccabees v. Nitsch*, 95 N. W. 626 (Nebr. 1903); *Myers v. Wheelock*, 57 Pac. 956 (Kans., 1899). Nor are vested rights divested in violation of the Federal Constitution, *Stafford v. Lick*, 7 Calif. 479 (1857). See also *Tucker v. Harris*, 13 Ga. 1 and *Farmers National Bank & Trust Co. of Reading to Use of Adams v. Berks County Real Estate Co. et al.*, 5 A. 2d 94 (Pa., 1939), the latter holding that the rule does not apply where no time is given to comply. It is true that there are decisions in some States, namely New York and Iowa, to the contrary, but generally the principle is an accepted

one. 121 A. L. R. 909. It is also true that such statutes usually, in terms, provide penalties but the question of absence in this enactment of a specific penalty provision is separately considered.

(2) The rule that where the law does not prescribe a penalty, one will not be judicially assessed was applied in *Zerres v. Vanina*, 134 Fed. 610 (1905); *Last Chance Mining Co. v. Bunker Hill & S. M. Co.*, 131 Fed. 579 (1904); see also *Sturtevant v. Vogel*, 167 Fed. 448 (1909); *Ball v. Bed Rock T. & M. Co.*, 36 Calif. 214, 219 (1868); *Johnson v. McLaughlin*, 4 Pac. 130 (Ariz.); *Bush v. French*, 25 Pac. 816, 830 (Ariz., 1874) and *Ford v. Campbell*, 92 Pac. 206, 208 (Nev., 1907). The State court cases cited appear to be squarely to the point, but the *Last Chance* case, *supra*, rests the decision upon the *actual* knowledge of the relocater while the *Sturtevant* case, *supra*, construes an Alaskan statute which merely required recorders to receive location certificates for record if the specified fee was paid, as being merely permissive. All of the cases construe State statutes, none of which affect the rights of the State but apply only to the rights of relocators of the same mining ground. Here the use or disposal of the land by the United States for the purposes of the Federal Power Act is involved.

A number of years subsequent to the above-cited decisions, the Supreme Court of the United States said with respect to penalties:

The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance, a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 569-70 (1930).

The same case pointed out that “* * * an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms * * *” but in *Virginia Ry. Co. v. System Federation*, 300 U. S. 515, 547 (1937), it applied the same rule to such “an affirmative declaration of duty.” The statute construed in *Texas etc. v. Ry. Clerks*, *supra*, provided that representatives shall be designated by each of the parties, *without inference, influence, or coercion exercised by either party* over the self-organization or designation of representatives by the other. In the *Virginia Ry. Co.* case, *supra*, it was provided that an interstate railway carrier *shall treat with certain certified representatives of a craft or class* and this provision was held to be enforceable. In the same case, the Court also

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expressed another rule quite general in its application, that is applicable here saying: "As we cannot assume that its addition to the statute was purposeless, we must take its meaning to be that which the words suggest * * *."

However, unless it can be said that the general mining law is merely directory in its requirements for maintaining a claim and qualifying it for patent, we are not required to say that this provision is one without a penalty. As was said in *Cameron v. United States*, 252 U. S. 450, 460 (1920), the execution of the laws regulating the acquisition of rights in the public lands is confided to the land department and the head of that department is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. It was there recognized that the mining law does not in itself confer authority in the land department to declare a mining claim for which no application for patent has been filed to be null and void but, it said, the law did not place it elsewhere and that, absent some direction to the contrary, the general provisions vesting authority in the land department also vested that authority. (The law contains no provision vesting authority in anyone.) It cited *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155 (1895) and *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301 (1903), to support its conclusion that the Secretary has broad powers to determine any questions arising under the public land (and mineral) laws. In *United States v. Barnes*, 222 U. S. 513, 520 (1912), the Court said:

Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.

In the *Cosmos* case, *supra*, the Court said with respect to the Forest Reserve Act:

* * * and the administration of the act is to be governed by the general system adopted by the United States for the administration of the laws regarding its public lands.

See also to the same effect *United States v. Jefferson Electric Co.*, 291 U. S. 386, 396 (1934); *Panama R. R. Co. v. Johnson*, 264 U. S. 375 (1924) and *United States v. Sweet*, 245 U. S. 563, 572 (1918). These cases are pertinent here because the act under discussion amends the mining laws. S. Rept. 1150, 84th Cong., 1st sess., last paragraph,

beginning on page 6. As such, it imposes an additional requirement on the owners of certain mining claims. Section 2325 of the Revised Statutes (30 U. S. C. sec. 29), which provides for patents to mining claims, expressly provides that before a claim owner can obtain a patent he must have "complied with the terms" of the mining law and must show such compliance under oath. It can hardly be said that a claim can be maintained *after* failure to comply with a positive requirement of the law compliance with which is also essential to the issuance of a patent. This is not to say that compliance with *all* patent requirements is necessary to the maintenance of a claim. But where, as here, compliance is required within a fixed period (not necessarily inclusive of a date when patent is applied for) rather than solely as one of the conditions to the issuance of a patent, failure to comply precludes not only the patenting of the claim but invalidates the claim itself just as much as if the failure related to a provision in the original mining law which this law amends, and the rules that have customarily been applied with respect to violations of the earlier law are equally to be applied here.

The answer to your first question is that it is necessary for the owner of a claim located prior to a withdrawal for power purposes to file a copy of his location notice in the land office for record within one year after enactment of Public Law 359, 84th Congress, 1st sess. [act of Aug. 11, 1955, 69 stat. 681.]

Failure to file as required results in a forfeiture of the claim.

The same answers apply to your second question which relates to locations on land opened to location under section 24 of the Federal Power Act, *supra*. The law makes no exceptions.

Question 3 relates to claims located on lands restored to mining location and located prior to the date of the act. Since the land in the claims continues to be subject to use for power purposes, they would appear to be in the same category as the other claims considered herein and the answer already given will apply to them as well.

ELMER F. BENNETT,

Solicitor.

ESTATE OF JOHN THOMAS, DECEASED CAYUSE ALLOTTEE NO. 223
AND
ESTATE OF JOSEPH THOMAS, DECEASED UMATILLA
ALLOTTEE NO. 877

IA-848

Decided November 6, 1957

Indian Lands: Descent and Distribution: Presumption of Death

An Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed dead. (25 CFR 81.20.) At common law and under the statutes of Oregon, a person is presumed to be dead after an unexplained absence of 7 years.

Indian Lands: Descent and Distribution: Presumption of Death

To determine death to have occurred at an earlier date than 7 years, evidence must show facts or circumstances which would establish that it was at an earlier date. If a precise period as to time of death must be established, it must be done so by evidence of such character as to make it probable that he died at the particular time.

Indian Lands: Descent and Distribution: Intestate Succession

The doctrine of ancestral descent is not applicable to an adult Indian estate under Oregon statutory laws.

APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS

Mr. Joe Hayes, through his attorneys, Ralph Currin, and Koerner, Young, McCollock and Dezendorf, has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance dated August 22, 1956, denying his petition for rehearing in the joint matter of the Estates of John Thomas, deceased Cayuse Allottee No. 223 and Joseph Thomas, deceased Umatilla Allottee No. 877.

John Thomas, the father of Joseph Thomas, died testate on September 22, 1940, at the age of 52, a resident of Oregon, leaving a restricted estate valued at \$63,811.09. Joseph Thomas, a resident of Oregon, who disappeared on August 3, 1939, was by decree issued by the Examiner of Inheritance on June 20, 1956, presumed to have died intestate on August 3, 1946, at the age of 35 years, being 7 years from the time of his disappearance, leaving a restricted estate valued at \$6,259.53. Orders by the Examiner of Inheritance in these estates, both dated June 20, 1956, approved the will of John Thomas dated October 13, 1923, which devised his entire estate, with the exception of some unrestricted personal property, to his son, Joseph Thomas, and determined that Joseph Thomas was survived by his maternal half brother, Samuel J. Luton, who was found to be entitled to the entire estate of Joseph Thomas and further found that Samuel J. Luton died December 18, 1954, intestate, leaving as his only heir at law, his wife, Emma J. Luton. By these findings, both estates vested

in Emma J. Luton. Mr. Joe Hayes, a first cousin of the decedent, John Thomas, represented by Attorney Ralph Currin, contended that Joseph Thomas should be declared legally dead as of the time of his disappearance in 1939, which would be prior to the death of his father, John Thomas, whereupon Joe Hayes would inherit the estate of his cousin, John Thomas.

The facts pertaining to the disappearance of Joseph Thomas appear to be that, in 1939, at the age of 28, he was employed at a CCC camp in Warm Springs, Oregon, and that on or about August 3, 1939, accompanied by a friend Tony Benson, he went to Portland, Oregon; that Joseph left his friend to buy a shirt, stating that he would return and meet his friend at a definite place, near where they would find a room. He failed to return and has not been heard of since. His friend searched for him and made inquiry of the police. He is said to have had an inclination to quarrel and fight when stimulated by drink. He did not appear to have any cause or reason for disappearing, being in no trouble of any kind, and it appears that he intended to return with his friend to the CCC camp at Warm Springs. He has not communicated with the Agency requesting lease money, as he had always done regularly before his disappearance. A diligent search and inquiry failed to produce any information relative to his whereabouts.

In his petition for rehearing and notice of appeal, appellant Joe Hayes contends that the laws of the State of Oregon are applicable in determining dates of death, heirship, and all matters relating thereto and that a party not heard from for 7 years is presumed dead (Oregon Revised Statutes 41.360 (26)); that the presumption of death applies only to the fact of death and not to the time of death; and that the date of death may be established by circumstantial evidence. Appellant urges that the only evidence relevant to the date of death shows without contradiction that Joseph Thomas died at the date of his disappearance and that there is no evidence in the record justifying the finding that Joseph Thomas died on August 3, 1946.

In the alternative, petitioner urges that should the Examiner of Inheritance adhere to his prior ruling that Joseph Thomas died on August 3, 1946, Joe Hayes, nevertheless, is the sole heir of Joseph Thomas, basing that contention upon the ancestral property theory, whereby, in the case of real property which came to an intestate by descent, devise or gift from an ancestor, all those relatives of the half blood who are not of the blood of the ancestor are excluded. He contends that although the provision as to brothers and sisters contained in the statute (Oreg. Rev. Stat. 11.020 (4)) generally applies to half bloods unless the contrary intent appears, Oregon does follow the ancestral property theory by statute in the case of minors. Oregon Revised Statutes 11.020 (5); *Cordon v. Gregg*, 164 Ore. 306, 97 P. 2d 723, 101 P. 2d 414 (1940).

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In his order denying the petition for rehearing, the Examiner made findings that, on the basis of previous determinations by the Department and court decisions reported in such cases,¹ and from the record established in this matter, the disappearance was the cause of death rather than that death was the cause of the disappearance, and that under Oregon statutes, Joseph Thomas could not have been declared legally dead before the expiration of 7 years' unexplained absence. The Examiner rejected the petitioner's contention as to the applicability of Oregon Revised Statutes 11.020 (b) by holding that it applies only to estates of minor decedents.

25 CFR 81.20 provides that an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed to be dead. The Department in its determination of this issue has adopted the laws of the state of domicile of the decedent.² The applicable Oregon statute (Oreg. Rev. Stat. 41.360 (26)) provides that a party not heard from for 7 years is presumed dead. It is established law that the presumption of death applies only to the fact of death and not to the time of death, and that there is no presumption that death occurred at any particular time during the 7-year period of absence, and that the date of death, like other facts, may be established by circumstantial evidence. We cannot agree with the contention of appellant that it is the general rule that mere disappearance, when surrounding circumstances show no motive for such disappearance is sufficient to justify a finding of death at or near the date of disappearance. It may appear in evidence that circumstances existed or events have occurred by which it may be inferred that the date of death was at about the time of disappearance or some other time during the 7-year period, but a mere disappearance without motive will not in itself accelerate the date of death prior to the termination of the 7-year period. In *Davie v. Briggs, supra*, the Court said:

* * * If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years. * * *

In the same case, the Court cited Taylor's *Treatise on the Law of Evidence* (sec. 157) that

* * * although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his

¹ *Davie v. Briggs*, 97 U. S. 628 (1878); *Butler v. Sup. Ct., Independent Order of Foresters*, 53 Wash. 118, 101 Pac. 481 (1909); *Crazy Baby, Cheyenne No. 2952* (Probate 66430-19); *Theodore Headman, Ponca Unallotted* (Probate 34188-35).

² *Estate of Jack (Jacque) Naylor, Yakima Allottee No. 4523*, Probate No. 20100-50 (1A-623); also *Estate of Columbus Tulee, Yakima Allottee No. 2860*, Probate No. 22837-44.

death; and, therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the presumption of the continuance of life.

In *Mutual Life Insurance Company of New York v. Zimmerman*, 75 F. 2d 758 (1935), the court said:

* * * If death must be established at a definite date before the expiration of the seven years, something besides the presumption is necessary. * * *

The circumstances attending the disappearance of Joseph Thomas are that he was expected to return to meet this friend; that he was expected to return to the CCC camp at Warm Springs; that he left to buy a shirt; that he had a tendency to become quarrelsome and fight when induced by strong drink; and that he did not continue to request from the Agency his rent money which has been accumulating from the time of his disappearance. We do not believe that these circumstances necessarily indicate any peril or danger. Nor is the fact that he was expected to return a justification for the presumption that he met death at any particular time. The fact, however, that he did not request, as was his usual habit, the funds available to him from the Agency, is admittedly a circumstance tending to show that death *may* have occurred at some time prior to the end of the 7-year period, but certainly that single circumstance does not establish a date with any certainty. In the absence of evidence justifying the fixing of an approximate date when death most likely occurred, it can only be determined that he died on some day within the 7-year period and that at the end of the 7-year period he is presumed to be dead. Otherwise stated, he is presumed to be dead from and after the 7-year period.

The great weight of authority is to the effect that the fixing of a time of death earlier than the 7 years is a question of fact to be determined by a jury, and that such a determination is proper without evidence of specific peril or immediate danger in the case of a party known to be sober, industrious, with strong domestic attachments and great affection for his family, and with fine regular habits who journeys from his home and is never again heard of. *Tisdale v. The Connecticut Mutual Life Insurance Company*, 26 Iowa 170 (1868); *Butler v. Supreme Court, Independent Order of Foresters*, *supra*. Such is not the case in the life of Joseph Thomas since none of these qualities appear to fit with his habits or way of life. The only circumstance surrounding his disappearance which might be said to indicate that death could possibly have occurred sometime during the 7 years is his failure to request rent money due him. But the record does not contain evidence fixing the time when request for funds was last made or when requests *may* have been made. Such evidence, to affect or control inheritance, must be such as to show

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that death occurred at the time of his disappearance or before September 22, 1940, the date of his father's death, which is not borne out by the record. We believe that the determination by the Examiner of Inheritance that Joseph Thomas was presumed to be dead on August 3, 1946, was proper under the law and the evidence in this matter.

We also agree with the finding of the Examiner as to the further contention of appellant in the alternative that under section 5 of Oregon Revised Statutes, 111.020 Samuel J. Luton, not being of the blood of the ancestor (John Thomas) from whom the property came to the decedent (Joseph Thomas), could not inherit the property. The statute is applicable only to estates of minors and can be given no consideration in this matter.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509, as revised; 17 F. R. 6793), the order of the Examiner of Inheritance denying the petition for rehearing is affirmed, and the appeal is dismissed.

The Superintendent of the Umatilla Indian Agency, Pendleton, Oregon, is directed to distribute the decedents' estates in accordance with the Examiner's orders dated June 20, 1956.

EDMUND T. FRITZ,
Acting Solicitor.

SEABOARD OIL COMPANY

A-27479

Decided November 7, 1957

Oil and Gas Leases: Extensions

The holder of a noncompetitive oil and gas lease is not given by his lease a contractual right to a 5-year extension which prevails over all other extension provisions of the Mineral Leasing Act, as amended.

Oil and Gas Leases: Extensions

The owner of a noncompetitive oil and gas lease which is producing in paying quantities at the end of the primary term of the lease is not entitled to a 5-year extension as to such of the leased land as may not be situated within the known geologic structure of a producing oil or gas field at that time.

Oil and Gas Leases: Extensions—Oil and Gas Leases: Unit and Cooperative Agreements

The owner of a noncompetitive oil and gas lease whose lease is committed to a unit plan is not entitled to a 5-year extension of his lease granted by section 17 of the Mineral Leasing Act where the lease is extended by the provisions of section 17 (b) of the act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Seaboard Oil Company has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated February 19, 1957, which affirmed the decision of the manager of the Cheyenne, Wyoming, land office, dated September 27, 1955, rejecting its application for a 5-year extension of oil and gas lease Wyoming 0846 (A) filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. IV, sec. 226).

Oil and gas lease Wyoming 0846 was issued to Robert R. Rose, Jr., on September 1, 1950, for a period of 5 years. The lease was committed almost in its entirety to the Whistle Creek unit plan approved on October 26, 1951 (I-Sec. No. 884). On March 13, 1952, assignments of undivided interests in all the land committed to the unit agreement from Rose to the appellant and others were approved, the assigned land being carried under a new serial, Wyoming 0846 (A). Production from the unit area was first obtained on November 7, 1951, from a well completed on that date. Two subsequent wells also obtained production in 1952, and on the basis of the three wells a participating area was established on July 22, 1952, effective as of November 7, 1951. The participating area was enlarged on August 30, 1955. At no time was any part of lease Wyoming 0846 (A) included in the participating area nor was any discovery ever made on the lease.

On August 26, 1955, 5 days before the expiration of the primary term of the lease, the appellant and the other record titleholders of the lease filed an application for a 5-year extension of the lease as to an 80-acre tract.¹ At the time the application for extension was filed the lease was still committed to the Whistle Creek unit.

On September 27, 1955, the application for extension was rejected on the ground that the lease was automatically extended by reason of production in paying quantities on the Whistle Creek unit. The manager held the lease "extended automatically for so long as oil or gas is produced in paying quantities." Seaboard appealed from this decision on October 24, 1955. No action was immediately taken on the appeal.

On November 2, 1955, a contraction of the Whistle Creek unit area was approved, effective as of October 1, 1955, which eliminated the lease involved from the unit.

On November 10, 1955, the manager issued a decision holding that the lease, having been eliminated from the unit, was continued in effect for 2 years after the elimination from the unit, or until September 30, 1957, and "so long thereafter as oil or gas is produced in paying quantities."

¹ The remaining land in Wyoming 0846 (A) was reassigned to Rose in an assignment filed on August 31, 1955, and approved on September 19, 1955. The reassigned land has been included in serial Wyoming 0846 (C), thus leaving only 80 acres in Wyoming 0846 (A).

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The Director's decision affirmed the manager's decision of September 27, 1955, but held that the decision was in error to the extent that it provided that the appellant's lease was continued "for so long as oil or gas is produced in paying quantities." The Director said that the lease would continue so long as it remained committed to the unit agreement. Although the Director did not expressly affirm the manager's decision of November 10, 1955, because no appeal was taken from that decision, he agreed with the manager's ruling. The appellant has appealed to the Secretary from the Director's decision.

The question presented by this appeal is, basically, whether the holder of a unitized noncompetitive oil and gas lease which is not situated within the known geologic structure of a producing oil or gas field at the end of its 5-year term and which is not producing oil or gas or sharing in any production of oil or gas from the unit area is entitled to a 5-year extension pursuant to section 17 of the Mineral Leasing Act, as amended, or only to continuation so long as it is committed to the unit agreement, as provided in section 17 (b) of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. IV, sec. 226e). A second question is presented as to how long the lease continues after its elimination from the unit agreement.

The fourth paragraph of section 17 (b), as amended by the act of July 29, 1954 (68 Stat. 585), provides in part as follows:

Any lease issued for a term of twenty years, or any renewal thereof, or any portion of such lease that has become the subject of a cooperative or unit plan of development or operation of a pool, field, or like area, which plan has the approval of the Secretary of the Interior, shall continue in force until the termination of such plan. Any other lease issued under any section of this Act which has heretofore or may hereafter be committed to any such plan that contains a general provision for allocation of oil or gas, shall continue in force and effect as to the land committed, so long as the lease remains subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease. * * * Any lease which shall be eliminated from any such approved or prescribed plan, * * * and any lease which shall be in effect at the termination of any such approved or prescribed plan * * * shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities.

There is no dispute that the appellant's lease was entitled to a continuation of its term past the expiration of its primary term on August 31, 1955, pursuant to the second sentence of the quoted paragraph. The Whistle Creek unit agreement contains a general provision for allocation of production, and production in paying quantities was obtained from the unit area prior to the expiration date of the primary term of appellant's lease. Therefore, the appellant's lease was entitled to continuation so long as it remained subject to the unit plan, which was until October 1, 1955, when the unit area was contracted and the appellant's lease was eliminated from the plan.

Thereafter, pursuant to the last sentence of the quoted paragraph, the appellant's lease was entitled to a 2-year extension from October 1, 1955, or until September 30, 1957, and so long thereafter as oil or gas should be produced in paying quantities. This is what the Director held.

The appellant, however, contends that although it is entitled to the extensions just described, it may elect to take the 5-year extension provided by section 17 of the Mineral Leasing Act, as amended. The third paragraph of that section, as amended by the act of July 29, 1954, *supra*, provides in part as follows:

Upon the expiration of the initial five-year term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law * * *. A noncompetitive lease, as to lands not within the known geologic structure of a producing oil or gas field, shall be extended for a period of five years and so long thereafter as oil or gas is produced in paying quantities. * * *

The appellant bases its contention on the ground that it has a contractual right to a 5-year extension of which it cannot be deprived. This ground is unsound. There is not a word in the appellant's lease concerning 5-year extensions.² On the contrary, the lease was issued "subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistencies with the terms of this lease occur" (sec. 1). Section 2 (b) of the lease also obligates the lessee to subscribe to and operate under a unit plan upon demand of the Secretary. The lease provides generally in its opening paragraph that it is issued "under, pursuant, and subject to the terms and provisions of the [Mineral Leasing] act of February 25, 1920 (41 Stat. 437), as amended, hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force when not inconsistent with any express and specific provisions herein * * *."

It is apparent from these provisions that one must turn to the statute and regulations to determine the lessee's rights. If anything, the lease indicates that if it is unitized the provisions of the act governing unitization control.

As we have seen, the provisions quoted from section 17 (b) are clearly applicable to the appellant's lease. On their face, the provisions quoted from section 17 are also applicable. If both sections in fact are applicable, there would be merit to the appellant's position that it has the right to elect under which section it desires an extension of its lease. The Director simply stated, in effect, that

² A new lease instrument was not executed when Wyoming 0846 (A) was created by assignment. The provisions of the segregated lease are the same as the provisions of the original lease issued to Rose; therefore, it is to the original lease that we must look to determine the provisions of the appellant's lease.

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because section 17 (b) is applicable, section 17 is not. He did not give reasons for his conclusion.

To determine the answer to the question presented, it is necessary to consider other provisions of the Mineral Leasing Act and to delve into the history of the pertinent provisions. As originally enacted in 1920, section 17 provided that land situated within the known geologic structure of a producing oil or gas field should be leased competitively for periods of 20 years with the right in the lessees to renew their leases for successive periods of 10 years (41 Stat. 443). For land not so situated, section 13 of the act provided for the issuance noncompetitively of 2-year prospecting permits (41 Stat. 441). This system was drastically changed by the act of August 21, 1935 (49 Stat. 674), which abolished the system of prospecting permits and 20-year leases. Section 17 was amended to provide for the issuance, competitively, of leases on land within the known geologic structure of a producing field and, noncompetitively, of leases on land not so situated (49 Stat. 676). The leases were to be issued for terms of 10 years and 5 years, respectively, "and so long thereafter as oil or gas is produced in paying quantities." Thus leases issued after August 21, 1935, were not subject to renewal. They were extended past their respective fixed terms only if production in paying quantities was being obtained at the end of the fixed terms. And, in the case of noncompetitive leases, production in paying quantities would continue a lease even though all of the land in the lease was not situated within the known geologic structure of a producing field.

With the outbreak of World War II, many holders of noncompetitive leases found it difficult or impossible because of wartime conditions to drill their leases. Accordingly, Congress passed the act of July 29, 1942 (56 Stat. 726), section 1 of which gave noncompetitive lessees a preference right to obtain a new lease for such parts of their leased lands as were not situated on the known geologic structure of a producing field at the end of the 5-year term of their leases. By the acts of December 22, 1943 (57 Stat. 608), September 27, 1944 (58 Stat. 755), and November 30, 1945 (59 Stat. 587), section 1 of the 1942 act was amended to provide that such leases should be extended to December 31, 1946, as to lands for which a preference-right lease could not be obtained, i. e., lands situated on a producing structure. See Solicitor's opinion, 58 I. D. 766 (1944); Solicitor's opinion, 60 I. D. 260 (1948). Thus, the 1942 act, as amended, drew a distinction as to extensions between land situated on a producing structure and land situated outside of such a structure. However, so far as I am aware, it was always understood that if a lease were producing in paying quantities at the end of its fixed term, it would be continued in its entirety so long as production continued, without regard to whether the leased land was wholly or partly situated on a

producing structure. In other words, producing leases were regarded as being in an entirely different category from nonproducing leases. Only in the latter category was it considered necessary for extension purposes to determine whether the leased land was situated within or outside of a producing structure.

The Mineral Leasing Act was extensively revised by the act of August 8, 1946 (60 Stat. 950). The 1942 act was repealed and in lieu thereof section 17 was amended to give the holder of a non-competitive lease a right to a single 5-year extension as to land not on a producing structure. Except for a reduction of the fixed term of competitive leases from 10 to 5 years, the 1946 act made no change in the basic term of leases, i. e., section 17 continued to provide that leases "shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities."

In view of the background of the 5-year extension provision it would seem that the same understanding should prevail regarding that provision as prevailed with respect to preference-right leases under the 1942 act. This seems to have been true until fairly recently. On May 15, 1957, the manager of the Santa Fe land office granted a 5-year extension as to part of the land in lease Santa Fe 080536, held by Edna Ione Hall, which was not situated on a producing structure, even though production was obtained on the lease prior to expiration of the primary term. However, in a memorandum dated June 24, 1957, to the State Supervisor for New Mexico, the Acting Director of the Bureau of Land Management declared that the lease was extended in its entirety by virtue of production and directed that the 5-year extension be revoked.

The Acting Director's position is sound in light of the history of the Mineral Leasing Act just related. This history shows rather conclusively that extensions were first provided for in 1942 to give relief to lessees whose leases could not be extended because they were unable to obtain production. Producing leases presented no problem because they were continued in their entirety so long as production continued. It would therefore seem plain that the holder of a producing lease is not entitled to a 5-year extension for such part of his leased land as is not situated within a known geologic structure of a producing field.

In addition to the 5-year extension, the 1946 act provided for a number of other extensions. Extensions were provided in cases of payment of compensatory royalty (sec. 17, 5th par.), subsurface storage (sec. 17 (b), 6th par.), segregation of leases by partial assignments (sec. 30 (a); 30 U. S. C., 1952 ed., sec. 187a), and, of course, unitization. The 1946 act, however, did not correlate the various extension provisions. It did not say, in the event two or more extension provisions were applicable, which one should con-

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trol. The answer, therefore, is a matter of statutory construction based upon what seemingly was the Congressional intent. Thus, as we have seen, it appears quite plain that the 5-year extension provision does not apply to producing leases. On the other hand, in the case of a partial assignment of a lease as to land not on a producing structure, where the assigned lease is entitled to a 2-year extension following a discovery on the retained portion of the lease, which extension would carry the assigned lease past its primary term, there seems to be no reason why the holder of the assigned lease may not elect to take the 5-year extension at the end of the primary term instead of the 2-year extension. It has so been held by the Director of the Bureau of Land Management. *Stanolind Oil and Gas Company et al.*, BLM-A 013349, etc. (April 30, 1956); *Clinch Drilling Company*, BLM-A 013337, etc. (November 16, 1956).

The question then is whether the extension of a noncompetitive lease committed to a unit agreement falls in the category of extensions of producing leases or in the category of extension provisions like the assignment provision. The history of the unitization provision shows clearly that a unitized lease falls in the category of producing leases. Prior to the 1946 act there was no statutory provision for the extension of unitized leases except 20-year leases. Unitized leases dependent upon production for continuance beyond their fixed terms were therefore seemingly dependent upon actual production for continuance. However, because of provisions in unit agreements that drilling and producing operations performed on any unitized land would be deemed to be operations under and for the benefit of all unitized leases, the Department held that all unitized noncompetitive leases would be extended so long as there was production in paying quantities anywhere in the unit area. All unitized leases were in effect deemed to be a single consolidated lease so far as production was concerned. When the 1946 act was before the Congress for consideration, the Department recommended the inclusion of a provision which would ratify and expressly sanction the Department's practice of extending unitized leases. Congress adopted the Department's proposal without change.³ It is indisputable therefore that the intent of section 17 (b) was to extend unitized noncompetitive leases on the theory that they are all, in effect, a single consolidated lease so that production anywhere in the unit area will extend all the leases even though there is no actual production from or allocated to a particular lease and even though the land in a lease is not even deemed to be situated on the known geologic structure of a producing field.

The Whistle Creek unit agreement specifically embodies this theory of unitization. Section 18 of the agreement provides in part as follows:

³The departmental practice and the adoption of the unitization provision in the 1946 act are set forth fully in *General Petroleum Corporation et al.*, 59 I. D. 383 (1947).

18. LEASES AND CONTRACTS CONFORMED AND EXTENDED.

The terms, conditions, and provisions of all leases, subleases, and other contracts relating to exploration, drilling, development, or operation for oil or gas of lands committed to this agreement are hereby expressly modified and amended to the extent necessary to make the same conform to the provisions hereof, but otherwise to remain in full force and effect; and the parties hereto hereby consent that the Secretary shall and by his approval hereof, * * * does hereby establish, alter, change, or revoke the drilling, producing, rental, minimum royalty, and royalty requirements of Federal leases committed hereto and the regulations in respect thereto to conform said requirements to the provisions of this agreement, and, without limiting the generality of the foregoing, all leases, subleases, and contracts are particularly modified in accordance with the following:

* * * * *

(b) Drilling and producing operations performed hereunder upon any tract of unitized lands will be accepted and deemed to be performed upon and for the benefit of each and every tract of unitized land * * *.⁴

Under subsection (b) the producing operations conducted in the Whistle Creek unit area must be deemed to have been conducted on the appellant's lease, thus investing it with the character of a producing lease. This was done by the express agreement of all parties to the unit plan. In the circumstances, as the appellant's lease must be deemed to have been a producing lease for purposes of continuation beyond its primary term, there is hardly a question that it is not entitled to a 5-year extension. The appellant admits that this has been the consistent ruling of the Director of the Bureau of Land Management.⁵

The case of *H. Leslie Parker, M. N. Wheeler*, 62 I. D. 88 (1955), does not require or point to a different conclusion. That case involved a 20-year lease committed to a unit agreement which was terminated before the 20-year term of the lease expired. The question presented was whether, in order to secure continuance of the lease beyond its 20-year term, it was necessary for the lessees to apply for a 10-year renewal or whether the lease would continue for so long as it was producing in paying quantities, pursuant to the last sentence of the fourth paragraph of section 17 (b). The Department held that the lessees could elect which extension they wanted. It is readily apparent that the facts and issues were entirely different from those presented here. Moreover, nothing said in that decision is at variance with the conclusion reached here.

It results then that the appellant was not entitled to a 5-year extension and that its lease continued past the end of its primary term (August 31, 1955) until the leased land was eliminated from the

⁴ This section is the same as section 18 of the standard form of unit agreement. See 30 CFR, 1956 Supp., 226.12.

⁵ *L. Clyde Olpin*, Salt Lake City 065034 (September 21, 1953); *Gordon Simpson*, Santa Fe 078412 (October 21, 1953); *Pacific Western Oil Corporation*, Buffalo 044376 (February 4, 1954); *Dan W. Johnston, Phillips Petroleum Company*, Santa Fe 078284 (March 18, 1954).

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Whistle Creek on October 1, 1955. Thereafter, pursuant to the last sentence of the fourth paragraph of section 17 (b), the lease was extended for a period of 2 years, or until September 30, 1957, the original term of the lease having expired prior to the elimination of the leased land from the unit.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision is affirmed.

EDMUND T. FRITZ,
Acting Solicitor.

D. J. SIMMONS

A-27478*Decided November 15, 1957*

Oil and Gas Leases: Reinstatement

A request to vacate decisions approving partial assignments of noncompetitive oil and gas leases and returning the lands assigned to the base leases on the ground that parties did not intend the assignments to be made will be rejected where the parties did not appeal from the decisions approving the assignments within the time allowed, the assignments are regular on their face, and the parties, although informed of the filing of the assignments, made no protest against them.

Oil and Gas Leases: Extensions

An oil and gas lease which enters an extended term of 2 years for reasons other than production does not fall into the category of leases in their extended term because of production upon the obtaining of production during the 2-year extended term.

Oil and Gas Leases: Assignments

The approval of an assignment of a document filed by the parties which on its face is a valid assignment of record title will not later be vacated on the unilateral assertion of one party that the document was intended solely for collateral security purposes.

Rules of Practice: Appeals: Generally

The failure to pay a \$5 filing fee for each of two leases involved in an appeal to the Director from a manager's decision does not require that the appeal be dismissed where (1) the regulation, later amended, was not clear, (2) the manager's decision stated that an appeal involving the two leases must be accompanied by a filing fee of \$5 and (3) the manager accepted the \$5 fee as sufficient.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

D. J. Simmons has appealed to the Secretary of the Interior from a decision dated February 15, 1957, of the Director of the Bureau of Land Management which affirmed the action of the manager of the Santa Fe land office in denying his request that two decisions, dated February 9, 1954, of the Chief, Branch of Leasing, Division of Minerals, Bureau of Land Management, be vacated. Each of these

decisions approved the assignment of a lease from Simmons to a group of assignees, known as the Boyer group, and a partial assignment of each lease by the latter to Simmons.

There are two groups of leases involved in this proceeding, namely, Santa Fe 079947, 079947-A, 079947-B, and 080000, 080000-A, and 080000-B. The base leases (079947 and 080000) were issued for a 5-year term, effective June 1, 1947. As a result of a partial assignment of each of the base leases to John A. Grambling, the "A" leases were created during the primary term of the base leases. Upon the expiration of the 5-year terms on May 31, 1952, it was determined that Santa Fe 079947-A was extended for 2 years, or to May 31, 1954, because the land covered by it was included within the known geologic structure of the Blanco Field and drilling operations were being conducted on the leasehold (30 U. S. C., 1952 ed., sec. 226; 43 CFR, 1949 ed., 192.121) and that Santa Fe 080000-A was extended for 2 years from March 3, 1952, the date of a discovery on base lease Santa Fe 080000 (30 U. S. C., 1952 ed., sec. 187a; 43 CFR, 1949 ed., 192.144). Memorandum to Manager, Land and Survey Office, Santa Fe, New Mexico, from Acting Oil and Gas Supervisor, Roswell, New Mexico, dated June 16, 1952.¹

On August 4, 1952, assignments of the "A" leases from Grambling to Simmons were filed. The assignment of Santa Fe 080000-A was approved in a decision dated August 7, 1952, of the associate manager. Although it appears that the assignment of Santa Fe 079947-A may have been approved on September 9, 1952, the record apparently was not clear on this point so that the decision of February 9, 1954 (*supra*), approved it specifically. In any event there is no question concerning the validity of this assignment.

Santa Fe 080000-A became a producing lease by virtue of a discovery made on October 12, 1952, and Santa Fe 079947-A became a producing lease because of a discovery made on December 18, 1952.

Thereafter, on May 21, 1953, a partial assignment of each "A" lease from the Boyer group to Simmons was filed. Although both assignments are undated, the parties to them completed the acknowledgments on various dates from January 29, 1953, to May 21, 1953. Receipt of these partial assignments was acknowledged in a letter dated July 29, 1953, from the manager to Simmons. At the time these assignments were filed (on May 21, 1953), there was nothing of record showing how the Boyer group had acquired any interest in the "A" leases.

¹ Lease SF 080000-A should also have been extended to May 31, 1954, pursuant to 43 CFR, 1949 ed., 192.121. See Associate Manager's decision, *D. J. Simmons*, August 7, 1952, stating the existence of all the facts required for an extension pursuant to sec. 192.121 but then concluding that the lease was extended to March 3, 1954, pursuant to 43 CFR, 1949 ed., 192.144.

This error is immaterial because when it became necessary to determine the expiration date of the lease, the proper date was used. Memorandum, Oil & Gas Supervisor, Roswell, New Mexico, to Manager, Land & Survey Office, New Mexico, dated July 1, 1954.

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On July 23, 1953, there were filed assignments, dated December 31, 1952, of both "A" leases in their entirety from Simmons to the Boyer group. The manager acknowledged the filing of these and two other assignments in a letter dated August 3, 1953, to Boyer.

On January 18, 1954, the Stanolind Oil and Gas Company filed with the Director, Bureau of Land Management, a request for approval of an operating agreement dated December 1, 1953, in which Simmons and the Boyer group named it as operator for the "A" leases and two others.

In separate decisions dated February 9, 1954, the Chief, Branch of Leasing, Division of Minerals, approved (1) the assignment of Santa Fe 079947-A from Simmons to the Boyer group and the reassignment of part of this lease from the Boyer group to Simmons, which created a new lease numbered Santa Fe 079947-B, (2) the assignment of Santa Fe 080000-A from Simmons to the Boyer group and the reassignment of part of it from the Boyer group to Simmons, which created a new lease numbered 080000-B, and (3) the operating agreement.

In a memorandum dated July 1, 1954, to the Manager, Land and Survey Office, Santa Fe, from the Oil and Gas Supervisor, Roswell, New Mexico, concerning the extension and expiration of oil and gas leases in May 1954, the "A" leases were listed as considered extended by producing operations and the "B" leases as having expired during that month.

In August and September of 1954, the manager and Stanolind exchanged several letters relating to the payment of rentals on the "B" leases. Stanolind was informed that the "B" leases had terminated during May 1954. Stanolind maintained that, production having been obtained on the "A" leases prior to the filing of the partial assignments in May 1953 which led to the "B" leases, the "B" leases were to remain in force for 2 years thereafter or to May 1955.

On September 22, 1954, the manager wrote Stanolind that his information was based on the Oil and Gas Supervisor's memorandum of July 1, 1954, and that since the case records for the "B" leases were in Washington the correspondence was being forwarded for further consideration and reply. There the matter seems to have rested.

In June 1956, Simmons, through his attorney, requested the manager to vacate the February 9, 1954, decisions creating the "B" leases and restore the lands to the "A" leases on the grounds that the parties had not intended the partial assignments to be approved, that creation of the "B" leases was inconsistent with the terms of the operating agreement of December 1, 1953, that the partial assignments failed to comply with the pertinent regulation, and that the assignments were intended to be instruments for oil and gas production payments and

not transfers of record title. In a decision dated June 28, 1956, the manager denied Simmons' request.

Thereupon, Simmons appealed to the Director, Bureau of Land Management. In a decision dated February 9, 1957, the Director first stated that the appeal was defective because the filing fees were inadequate and the appellant was, in effect, seeking to appeal from the February 9, 1954, decisions after they had become final by lapse of time and then affirmed the manager's decision on the ground that the documents in question clearly were assignments transferring the record title and that there was nothing in the operating agreement inconsistent with such action.

Simmons has taken this appeal to the Secretary from the Director's decision. Despite the fact that the Director found his appeal defective on two procedural grounds, Simmons has not questioned the Director's decision on these points, but has confined himself to a discussion of the merits. However, appeals which do not comply with the Department's rules of practice (43 CFR, 1956 Supp., Part 221) are subject to dismissal for that reason alone. Although the applicable regulation states that the failure to pay the proper filing fee on appeal will result in the case being closed without consideration (43 CFR, 1956 Supp., 221.2), and the appellant paid only a \$5 filing fee, instead of two such fees, one for each of the "B" leases involved, at the time he filed his appeal to the Director, July 25, 1956, the regulation (43 CFR 221.2, Circ. 1950, 21 F. R. 1860) was not entirely clear on the amount of filing fees to be paid on an appeal involving more than one lease. The regulation was later amended to remove all doubts (43 CFR, 1956 Supp., 221.2). Because of this uncertainty and because the manager accepted the appeal without questioning the amount of the filing fees, I do not believe the appeal ought to be dismissed on this ground.

The other procedural defect, namely, the failure of the appellant to file a timely appeal from the decisions of February 9, 1954, which approved the assignments in question, is more serious. By his failure timely to appeal from these decisions the appellant allowed them to become final and determinative of the rights they affected and he now has no right to take an appeal from them.

Nevertheless, so long as the lands remain within the jurisdiction of the Secretary of the Interior, he may review and correct erroneous actions previously taken within the Department respecting such lands. *Tolan-Dowse Controversy*, 61 I. D. 20, 24 (1952), and cases cited. Corrective action may be taken either on the Secretary's own initiative (*id.*) or upon proper application by an interested party. *Brookhaven Oil Company*, A-27459 (July 29, 1957).

Thus, if Simmons' petition is not treated as an appeal, but, as he referred to it, as a request for reconsideration, the fact that it was

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too late to serve as an appeal does not act as a bar to a review of the matters at issue. However, as a petition for reconsideration, it is subject to certain factors that would not bear upon an appeal. One of these is that whereas an appeal is a matter of legal right, a petition for reconsideration is addressed only to the discretion of the Secretary (or his delegate). Another is that a petition for reconsideration is subject to intervening rights of others and to changes in circumstances.

Considering Simmons' petition as a request for reconsideration, I find no reason to disturb the actions of the manager and the Director. The assignments from Simmons to Boyer of the "A" leases and the partial assignment back to Simmons of the "B" leases are clearly documents transferring record title. They were filed as assignments of record title and acknowledgments of the fact that they had been filed and copies of the decisions approving the assignments were mailed to the parties, all without occasioning any protest. The operating agreement dated December 1, 1953, filed by Stanolind, contains nothing to the contrary. The so-called "Master Operating Agreement," which was signed by the parties on December 1, 1953, but not filed until June 1, 1956, specifically states in the third "Whereas" clause that the record title to the W $\frac{1}{2}$ sec. 23, W $\frac{1}{2}$ sec. 24, E $\frac{1}{2}$ sec. 26², T. 29 N., R. 9 W., N. M. P. M., is in Boyer *et al.*, and the record title to the W $\frac{1}{2}$ sec. 35, same township and range is in Simmons. All of these tracts were originally in Santa Fe 080000-A as created by assignment from Grambling to Simmons. Similarly, this agreement recognizes Boyer *et al.*, as the record titleholders of the W $\frac{1}{2}$ sec. 36, and Simmons as the record titleholder of the W $\frac{1}{2}$ sec. 33, lands originally in Santa Fe 079947-A. The only way the record title to these tracts could have been so allocated was by recognition of the assignments in question.

Thus, the "Master Operating Agreement" not only is not inconsistent with the creation of the "B" leases, but strongly supports the conclusion that the parties recognized the existence and validity of the assignments. Therefore, I conclude that the assignments were valid and created the segregated "B" leases.

The appellant also contends that if the validity of the "B" leases is assumed, they would not have expired until 2 years after the effective date of the assignments, which the appellant indicates was May 21, 1953.

In support of this proposition, he cites the current regulation relating to the extension of leases segregated by assignment. 43 CFR 192.144 (b). This regulation was amended by Circular 1894 (19 F. R. 9278, December 29, 1954) to conform it to the provisions of

² Lease Santa Fe 080000-A included only the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 26.

section 30 (a) of the Mineral Leasing Act, as amended by section 1 (6) of the act of July 29, 1954 (43 U. S. C., 1952 ed., Supp. IV, sec. 187a). The regulation in effect at the time the "B" leases were created provided:

(b) Undeveloped parts of leases assigned out of leases which are in their extended term because of production shall continue in effect for two years and so long thereafter as oil or gas is produced in paying quantities. [43 CFR, 1949 ed., 192.144.]

The "A" leases were in their extended terms pursuant to 43 CFR, 1949 ed., 192.121, which authorizes a 2-year extension of a lease for lands within a known geologic structure of a producing oil and gas field at the expiration date of its primary term and upon which drilling operations are being diligently prosecuted.³

Thus, because neither of the "A" leases was in its extended term because of production, the provisions of 43 CFR, 1949 ed., 192.144 (b) did not apply to them and the terms of the "B" leases were not extended beyond the expiration date of the "A" leases.

The appellant also contends that Boyer *et al.*, never qualified to become lease holders under the Mineral Leasing Act. The decisions of February 9, 1954, held that—"Satisfactory evidence of the qualifications and holdings of the respective assignees under the Mineral Leasing Act, as amended, has been filed." There is nothing to indicate that this finding is in error.

The appellant further contends that the assignments from Boyer *et al.* to Simmons were not valid because the assignments from Simmons to Boyer *et al.* were not filed within 90 days of their execution as required by the pertinent regulation. 43 CFR 192.141. He refers to the latter as being dated July 21, 1952, and filed for approval July 23, 1953, whereas the assignments of record are dated December 31, 1952, and were filed on July 21, 1953. However that may be, the 90-day filing period has not been interpreted to be mandatory, and, in any event, the time to object to the assignments has long since expired.

Finally, the appellant says that the instruments were executed for collateral security purposes to finance the continued development of the land. Whatever the private purposes of the parties may have been, the assignments were filed as assignments, and were acted upon as such without protest from the parties. There is no reason for the Department to treat them as other than what they purport to be.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

³ As to SF 080000-A, see footnote 1, *supra*.

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W. V. MOORE

A-27497

Decided November 19, 1957

Oil and Gas Leases: Applications—Oil and Gas Leases: Termination

Where an oil and gas lease is automatically terminated because of the lessee's failure to pay the annual rental when due, the land in the lease is not available for the filing of offers to lease until the termination is noted on the tract book.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

W. V. Moore has appealed to the Secretary of the Interior from a decision of the Associate Director, Bureau of Land Management, dated March 26, 1957, which affirmed a decision of the manager of the Billings, Montana, land office, dated October 13, 1955, rejecting his oil and gas lease offer (Montana 020774) for a noncompetitive oil and gas lease for the reason that the lands applied for were not available for leasing at the time the offer was filed on October 7, 1955. The manager held that in accordance with the applicable departmental regulation, 43 CFR 192.161, the lands applied for did not become available for leasing until October 10, 1955, when notation was made on the tract book of the land office of the termination of a former lease (Great Falls 087632) which embraced all of the lands applied for by the appellant.

The record shows that oil and gas lease Great Falls 087632 was issued for a 5-year period on October 1, 1949. On April 26, 1955, the lease was extended for a 5-year period until September 30, 1959,¹ subject to the provisions of the act of July 29, 1954 (68 Stat. 583). That act, among other amendments, amended section 31 of the Mineral Leasing Act to provide that upon failure of a lessee to pay the lease rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease "shall automatically terminate by operation of law" (30 U. S. C., 1952 ed., Supp. IV, sec. 188). As the lessee failed to pay the seventh year's rental under lease Great Falls 087632, it terminated by operation of law on October 3, 1955.² Notation of the termination of the lease on the tract book was made on October 10, 1955, 3 days after the appellant's lease offer was filed.

The pertinent regulation of the Department in effect at the time oil and gas lease Great Falls 087632 terminated was and is as follows:

¹ The lease was stated to be extended to "10/31/59," which was an obvious error since the primary term of the lease expired on September 30, 1954.

² The lease expired on October 3, 1955, rather than on October 1 for the reason that October 1, 1955, was a Saturday when the land office was not open for business. The act of July 29, 1954, *supra*, provides that when the time for payment of rental falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made. The next official working day was Monday, October 3, 1955.

192.161. *Cancellation and termination of lease.* (a) Any lease issued after July 29, 1954, or any lease which is extended after that date pursuant to § 192.120, on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental on or before the anniversary date of such lease. * * * The termination of the lease for failure to pay the rental must be noted on the tract book, or, for acquired lands, on the official records relating thereto, of the appropriate land office. *Until such notation is made, the lands included in such lease are not subject to, nor available for, leasing. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.* [43 CFR, 1956 Supp., 192.161; italics added.]

The manager's action was strictly in accordance with this regulation and was therefore presumptively correct. He had no authority to disregard the regulation. Recognizing this, the appellant has attacked the validity of the regulation. He contends that it is contrary to the statute, that it amounts to an attempt to withdraw lands from leasing, and that even though the Secretary has authority to adopt rules and regulations the regulation in question is arbitrary and unreasonable.

The first contention is that the 1954 amendment to section 31 of the Mineral Leasing Act provides for automatic termination of a lease upon failure to pay rental and says nothing about a notation being required before the land in the lease becomes available for further leasing. The appellant asserts that, prior to the 1954 amendment, the Department had repeatedly held that at the end of the 5- or 10-year term of a lease the land in the lease become available for leasing without any notation having to be made and that Congress had this in mind when it passed the 1954 amendment.

The answer to this contention is that the 1954 amendment merely provides for automatic termination of a lease upon a default by the lessee. It does not purport to say when the leased land becomes open to filing. As will be seen later, the termination of leases or entries on public land has generally and historically not meant that the land immediately becomes available for filing. It is true that prior to and at the time of the 1954 amendment, land in a noncompetitive oil and gas lease became available for filing upon the expiration of the primary term or extended 5-year term.³ But normal termination of a lease at the end of a fixed term is not the same as a termination by default or voluntary action before the end of the fixed term. This too will be elaborated later. Consequently, there is no reasonable basis for holding that Congress intended that land in a lease automatically terminated for default in payment of rental should become immediately available for filing.

³ On March 17, 1955, paragraph (f) was added to 43 CFR 192.120 to provide that the filing by a lessee of a timely application for a 5-year extension of his lease shall segregate the land from further filing until notation is made of the action taken on the application. 43 CFR, 1956 Supp., 192.120.

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The only possible indication to the contrary is to be found in two statements made and submitted by Lewis E. Hoffman, then Chief of the Division of Minerals, Bureau of Land Management, at the hearing on the 1954 act. In a written statement Mr. Hoffman said that one administrative advantage of the amendment to section 31 would be that "it would immediately open up lands for those who desire to prospect the area without delay and thereby promote exploration of oil and gas." Hearings on S. 2380, 2381, and 2382, Subcommittee on Public Lands, Senate Committee on Interior and Insular Affairs, 83d Cong., 2d sess., p. 41; S. Rept. 1609, 83d Cong., 2d sess., p. 4. It seems apparent from the context of the statement that the word "immediately" was used only in a relative sense and not to mean that land would be opened to leasing the instant a lease was automatically terminated. This is clearly evidenced by the description in Mr. Hoffman's statement of the procedure then required for canceling a lease upon default in rental payment, including the necessity of giving the delinquent lessee 30 days' notice of his default before cancellation could be effected. Nothing was said in the statement about noting cancellations under the then existing procedure or about noting terminations under the proposed amendment; consequently, the statement cannot be read as indicating whether or not notation would be necessary.

Mr. Hoffman also made the following statement in a colloquy with Senator Barrett as to a lessee's rental obligation under the proposed amendment:

* * * It has the effect that he must pay—if we amend it the way I am going to propose, if he does not pay it on the anniversary date, on or before the anniversary date, he is out, and the very first day the first qualified applicant would be entitled to the lease. [Hearing, *supra*, p. 37.]

It must be conceded that this statement rather clearly indicated Mr. Hoffman's belief that the land in an automatically terminated lease would be available for filing the day after the lease was terminated. This would suggest that Mr. Hoffman did not recognize the necessity for noting a termination before the land would be opened to filing. However, Mr. Hoffman's reference to the availability of the land for further leasing was purely incidental to the discussion that he was having with Senator Barrett when he made the statement. The discussion was on the question whether the 1954 amendment would apply to leases outstanding at the time when the amendment was adopted. In the context in which it was made, without any question being raised as to whether the notation rule would be applicable, Mr. Hoffman's offhand remark can hardly be magnified into an expression of Congressional intent in adopting the 1954 amendment.

As for the appellant's contention that the application of the notation rule amounts to a withdrawal of the land from leasing, it is suffi-

cient to say that the notation rule has been a time-honored administrative rule for over half a century. It has been followed consistently through the years in a variety of different types of entries and situations. It was adopted in connection with the Mineral Leasing Act almost from the time of the enactment of the statute. The history and reasons for the rule are set forth fully in the case of *E. A. Varighey*, 63 I. D. 85 (1956).

In *M. A. Machris, Melvin A. Brown*, 63 I. D. 161 (1956), the Department had before it an argument akin to the appellant's contention here. In that case the question was presented whether when a lease was relinquished but no notation of the relinquishment was made until after what would have been the expiration of the primary term of the lease, if it had not been relinquished, the land became available for filing after such expiration date or only after notation of the relinquishment was made. The applicable regulation (43 CFR 192.43) provided that land in a canceled or relinquished lease should become available for filing only after notation of the cancellation or relinquishment was made on the tract book. It was asserted, in effect, that the segregative effect of a lease could not be extended beyond what would be the expiration date of the lease in the absence of the relinquishment. The Department said—

* * * it is the Secretary who determines when lands shall be available for the filing of lease offers. The Mineral Leasing Act does not make such determination. It leaves that determination to the Secretary under such rules and regulations as he may adopt * * *. [Pp. 162-163.]

With respect to the appellant's remaining contention, that the regulation is arbitrary and unreasonable, the sole basis of the contention is a comparison drawn by the appellant between the situation existing at the end of the extended 5-year term of a lease and the situation involved here. He sees no reason why notation is not required in the first situation but is required in the second situation. The distinction is clear. It was set forth as follows by the Associate Director of the Bureau of Land Management in his memorandum of February 15, 1955, to the Secretary recommending the amendment of the regulation in its present form:

You will note that a distinction is drawn between a case where no application for lease extension is filed within the period prescribed by law and a case where the annual rental is not paid on or prior to the due date. In the former case, the land automatically becomes subject to lease [see footnote 3], but in the latter the proposed regulations provide that notation of lease termination is required before the land is subject to the filing of lease applications. The reason for the distinction is that, in the first case prospective applicants can learn whether an application has been filed from the public records available in the land office, but in the second case they cannot know whether the rental has been paid unless or until some notation is made on the records. The notation of rental payments is not made on the status records and for that reason it is necessary to note the termination of the lease or, at least, the failure to pay the rental in order that public notice may be given.

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Hence, the rule that land embraced in a lease terminated for default in rental payment is available for further leasing only after the termination is noted in the tract book is based on sound administrative principles and fair play. The rule is not unnecessary or arbitrary; it is the only method whereby all of the public can be assured of an equal opportunity to file an application for land which has become available for leasing.

The appellant has presented no basis of error in the Associate Director's decision.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

WADE McNEIL ET AL.¹

A-27439

Decided November 19, 1957

Administrative Procedure Act: Rule Making—Grazing Permits and Licenses: Special District Rules

The provisions of section 4 of the Administrative Procedure Act relating to rule making do not apply to a special rule issued under the Federal Range Code and applicable to the range in a particular district because the rule involves use of the Federal range which is public property, and matters relating to public property are expressly excepted from the provisions governing rule making in section 4 of the Administrative Procedure Act.

Grazing Permits and Licenses: Special District Rules

The Federal Range Code provides that where local conditions in a district make necessary the adoption of a special rule on any of the matters in the range code, such a rule may be adopted for a particular district, and where a special rule is adopted which provides that a different priority period shall be used than the period provided in the code, and there are persuasive reasons in support of the adoption of such a rule, the award of grazing privileges in the district may be made in accordance with the special rule, there being no statutory requirement that any priority period be used in determining preferences in the issuance of grazing permits.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Wade McNeil has appealed to the Secretary of the Interior from a decision of November 6, 1956, by the Director of the Bureau of Land Management involving the award of grazing privileges and use of the Federal range in Montana Grazing District No. 1 under the Taylor Grazing Act (43 U. S. C., 1952 ed., sec. 315 *et seq.*).

¹ Intervenor in this proceeding are B. E. Barrett, Archie Carberry, Earl Shores, John and Martin Matovich, T. R. Wilson, Town Brothers, and Charles H. McChesney.

Montana Grazing District No. 1 was established by an order of July 11, 1935, of the Secretary of the Interior. With the exception of lands in Montana, grazing districts under the Taylor Grazing Act were generally established by the Department in areas in which the land consisted predominantly of public domain. In Montana, public lands, State lands, county tax default lands, deserted homestead lands, and Resettlement Administration lands were so extensively intermingled that administration of the public domain in a number of grazing districts was not feasible unless it was coordinated and unified with the administration of lands owned by various units of the Federal and State Governments. For many years non-profit, cooperative Montana State grazing associations, or cooperative State grazing districts have been authorized to lease privately owned, State, and county lands and to apportion the grazing privileges thereon to their members (Revised Codes of Montana (Anno.), 1935, secs. 7364.7-7364.29; Revised Codes of Montana, 1947, secs. 46-2301-46-2332). In a number of instances where State districts were within the boundaries of Taylor Act districts, the Secretary of the Interior entered into cooperative agreements with the State grazing associations, giving the State associations control of the Federal lands, under the supervision of the Division of Grazing (predecessor of the Bureau of Land Management in the administration of the Federal range within grazing districts), in order better to regulate the use and occupancy of the Federal lands and to permit a coordinated use of all of the lands in the district.²

Grazing license applications for use of the range in Montana Grazing District No. 1 during the 1935-1936 grazing season were filed with the Grazing Service, but between April 9, 1936, and November 24, 1952, all of the Federal range lands in this district were administered by the South Phillips Cooperative State Grazing District under a cooperative agreement between the Secretary of the Interior and the South Phillips district.³ The agreement provided in pertinent part that the Secretary would issue to the State district an annual license or term permit for grazing privileges which could be used on the Federal range in the State district by its licensees or permittees. The

² See memorandum "Legal Problems in Grazing Regulation" accompanying Secretary's letter of November 14, 1936, to the Chairman, Great Plains Committee, Rural Electrification Administration.

³ The agreement was originally for 5 years. It was in effect continued by a new agreement executed on November 24, 1942, effective for 10 years. The record does not contain a copy of the 5-year agreement, but the terms of that agreement were similar to those of the 1942 agreement. Transcript of Hearing, May 4-8, 10, 1954, at Malta, Montana, on the appeal of Wade McNeil from the decision of March 27, 1953, by the area manager, Bureau of Land Management, Malta, p. 4. (Page numbers hereafter refer to the transcript of this hearing unless otherwise noted.)

See forms for cooperative agreements to be used in entering into contracts with State grazing associations under section 3 of the Taylor Grazing Act, and special covenants for incorporation in the general form of cooperative agreements with State grazing associations in the State of Montana, approved March 16, 1936, by the Secretary of the Interior.

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State district agreed to estimate and, with the approval of the Secretary or his authorized representative, fix the carrying capacity of the Federal range and State district lands, determine the numbers and kinds of livestock to be grazed thereon, and fix the seasons of use. The State district also agreed to issue licenses or permits to graze on all range lands subject to the agreement according to the by-laws of the State district, with a proviso that the State district was required to grant grazing privileges to all applicants living within or near the district who were certified to the district by the regional grazier as being entitled to the use of the Federal range for grazing. Special covenants in the agreement included provisions that the rules and regulations and the by-laws of the State district were to govern in the administration of the lands in the State district so far as they did not deny to any qualified applicant within or near the State district any rights or privileges to which he might be entitled under the Taylor Act and the Federal Range Code. On November 24, 1952, the cooperative agreement between the South Phillips district and the United States terminated, and since that date the lands here under consideration have been administered directly by the Bureau.

For a number of years after establishment of Montana Grazing District No. 1, the demand for grazing privileges on the range within the district was not great, but gradually many operators increased their numbers of livestock, and, in recent years, the demand for Federal range privileges has exceeded the amount of range available. In an attempt to satisfy the requests of livestock operators in the area, the South Phillips district awarded range privileges on a basis which does not appear in the record, but which was not in accordance with the requirements of the Federal Range Code. (Tr. 15-66; 78-90; 273-278; 291-295; 424-426; 441-445; 449; 452-455; 465-466. Note 13 of hearing examiner's decision and Transcript of Hearing (May 4 and 5, 1953) in *Wade McNeil v. Leland E. Fallon et al.*, Civil No. 1494, in the United States District Court, District of Montana, Havre Division, pp. 22-31.) Consequently, when the Bureau resumed administration of these lands in 1952, it was confronted with a situation in which livestock operators had been awarded grazing privileges on the Federal range over a period of many years, during which time they had built up businesses which required use of the range if they were to continue in existence. However, these livestock operations were developed on a basis of use of the Federal range which does not conform with the requirements of the range code.

In awarding grazing privileges for the 1953 season, the Bureau tried to work out a method which would least upset the recognized range operations, and at the same time allow privileges in conformity with the requirements of the act and the code. (Tr. 5.) The district manager testified at the hearing on these appeals that the advisory

board considered whether to try to go back to the priority period of 1929-1934 in determining grazing privileges, but since it seemed practically impossible, because of lack of records, to obtain accurate information as a basis for fairly awarding privileges to operators who had been using this range for many years, the Bureau relied, in granting 1953 licenses, primarily on preferences recognized by the South Phillips district (Tr. 90-91; see tr. 16, 78-86).⁴ The issuance of licenses by the Bureau in 1953 was based, so far as possible, on recognized certified preferences, i. e., privileges of individual applicants certified by the Bureau to the South Phillips district during the years the South Phillips district administered the land (Tr. 16, 36, 76, 78). However, officials of the Bureau did not know how class 1 preferences which had been certified were determined or whether the certified privileges had a relationship to use of the range by an applicant during the priority period (Tr. 35, 54, 78, 82). The determination of class 2 privileges by the Bureau for the 1953 season was based upon use for the 4 highest years of the 5-year period prior to 1952, and temporary use which had been allowed by the South Phillips district was recognized by the Bureau in varying amounts in granting 1953 licenses (Tr. 16, 25-26, 61, 86, 710).

Mr. McNeil, the appellant in this proceeding, filed an application with the area manager of the Bureau at Malta for grazing privileges during the 1953 grazing season. In his application, the appellant requested grazing privileges amounting to 2,380 AUM's on the individual allotment of 20 sections which he used in 1952 and on 31½ additional sections of range. On March 27, 1953, the area manager allowed appellant's application to the extent of approximately 1,623 AUM's on about 19 sections of the Federal range which the appellant had used during 1952, and rejected the application for grazing additional numbers. The decision of March 27, 1953, also denied the application for additional range and a part of the range which the appellant had used in 1952 was required to be shared with two other operators in the area. Mr. McNeil appealed to a hearing examiner from this decision⁵ and from a decision of March 11, 1954, by

⁴ The Secretary for the South Phillips district, between January 1948 and May 1954, corroborated this testimony regarding the lack of records (Tr. 466-467, 479-480).

Information in other departmental files indicates that there are practically no records of basic data necessary for determining grazing privileges in this area nor records of the administration of the district from the time it was organized until January 1948 (see report of October 17, 1952, by Assistant Regional Chief of Range and Forest Management, Region III, and the Secretary of the Montana Grass Conservation Commission of Conclusions and Recommendations on the South Phillips District).

⁵ The appellant has had exclusive use of the entire area which he used in 1952 pending determination of this appeal. Since 1947, the area referred to as the McNeil allotment (Pastures, A, B, C, and D, as represented by Bureau's map, Exhibit 2, at the hearing) has been completely enclosed by fences. In 1948 the South Phillips district allotted the use of Pasture D to intervenor B. E. Barrett. Mr. McNeil appealed from the action of the board to the Montana State Grass Conservation Commission. The Commission sustained the action of the local board and in addition reclassified the class 2 rights of Mr. McNeil as temporary under Montana statutes. Mr. McNeil appealed from this decision to the District

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the area manager which rejected in part the appellant's application for grazing privileges during 1954. A hearing on these appeals was held before a hearing examiner on May 4, 5, 6, 7, 8, and 10, 1954, at Malta, Montana, at which the Bureau was represented by the regional counsel and the appellant and intervenors (listed in note 1) were represented by counsel.

The examiner formulated three issues to be determined at the hearing, namely: (1) the extent of the appellant's class 1 range privileges under the code and the act; (2) the extent, if any, of the appellant's class 2 range privileges; and (3) the area of appellant's Federal range use. The Bureau contended that Mr. McNeil was entitled to no more grazing privileges than the amount of certified class 1 privileges, as established by the South Phillips district, plus a proportionate share of privileges available in the district above recognized class 1 demand. Testimony and argument were submitted in support of the appellant's position that he was entitled to exclusive use of the area of the range which had been allotted to him during the 1952 grazing season by the South Phillips district; that other users of the range in this area had been awarded privileges to which they were not entitled under the range code; and that the carrying capacity of the range in the appellant's allotment, as determined by range surveys made in 1952 and 1953 by range conservationists of the Bureau, was too high.

In a decision of January 19, 1955, the examiner held that the appellant was not entitled to any particular portion of the Federal range, and that the only question to be decided was whether the allotted area provided sufficient forage to satisfy the appellant's licensed livestock. After considering the extensive testimony at the hearing concerning the carrying capacity of this range, the examiner concluded that the range surveys of 1952 and 1953, made by qualified Bureau employees, approximated the actual carrying capacity of the range and were properly used as the basis for allotting the range in the area.

Court of the Seventeenth Judicial District of the State of Montana in and for the County of Phillips. On June 18, 1951, the District Court restored to Mr. McNeil the use of Pasture D, found that Mr. McNeil was entitled to the use of all Pastures A, B, C, and D for so long as he ran approximately the same number of cattle as he then ran, and so long as he had sufficient commensurate property, and that he was entitled to grazing privileges for 282 animal units. On May 13, 1953, after the Bureau granted to two of the intervenors in this proceeding privileges to graze certain cattle in common with Mr. McNeil's cattle in Pasture C, Mr. McNeil was granted a preliminary injunction by the United States District Court for the State of Montana under which the intervenors, the Bureau's area manager, the Regional Administrator, Region III, and the Secretary of the Interior were restrained, pending the determination of this appeal, from interfering with the use by Mr. McNeil of all of Pastures A, B, C, and D. This action was based upon the provision in the range code (formerly 43 CFR 161.9 (j) now 161.10 (i) (1956 Supp.)) that an appeal shall suspend the effect of an order appealed from pending the decision on appeal unless the public interest requires otherwise in which event the decision may be made effective in the manner prescribed by the regulation.

The examiner found that the appellant has commensurate base property adequate to support 439 animal units for 4 months each year (the range in the area is classified for use 8 months). Since December 1944, when the South Phillips State Grazing District list of privileges was approved or certified by the Bureau of Land Management, the Bureau acknowledged that the appellant had established class 1 grazing privileges in the amount of 1,376 AUM's (172 animal units). The examiner found, however, that the Bureau's recognition of the appellant's class 1 rights was erroneous. The examiner's decision held that the appellant is entitled to class 1 grazing privileges of not more than 90 animal units or 720 animal unit months of feed under the provisions of the range code because of his ownership or control and use of dependent base property during the priority period; that as the appellant owns or controls base property with commensurability in excess of that needed to support his class 1 grazing privileges, he is entitled to share in class 2 privileges in an amount to be determined by the area manager on an equitable basis. The examiner held further that the appellant is entitled to an area of Federal range for his use, sufficient to produce forage to satisfy his demand on that range, or to share in common with others an area which produces sufficient forage to satisfy the demand of all the common users. The examiner remanded the case for further action by the area manager in conformity with the decision.

The Director's decision on Mr. McNeil's appeal from the hearing examiner's decision affirmed the examiner's ruling that the appellant was not entitled to use any particular portion of the Federal range and the examiner's ruling that the range surveys of 1952 and 1953 were properly used as a basis for allotting the range in the area and that the carrying capacity of the range allotted to the appellant was accurately reflected by these surveys. The Director's decision held further that the other issues raised on appeal were moot because on June 19, 1956, a special rule governing the determination of grazing privileges was adopted for this area which made it unnecessary to decide any questions regarding the correctness of past awards of grazing privileges to the appellant.

The special rule (21 F. R. 4292), issued by the Director in accordance with 43 CFR, 1956 Supp., 161.16, states that it was recommended by the advisory board of Malta Grazing District (Montana No. 1), that a factual showing of its necessity was made by the State Supervisor and concurred in by the Area Administrator. The rule provides that in determining dependency by use of base properties in this area, the priority period shall be the 5-year period immediately preceding January 1, 1953, and that base lands are dependent by use (class 1) to the extent that during each year of the priority period licenses for use of the Federal range in connection therewith were issued under

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the rules and regulations of the Montana Cooperative State Grazing Districts. These provisions of the special rule are distinctly different from the corresponding provisions of the range code (43 CFR, 1956 Supp., 161.2 (k)) which provide in pertinent part that:

(1) "Land dependent by use" means forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the "priority period", was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain, now part of the Federal range. The priority period shall be the five-year period immediately preceding June 28, 1934, except that if such Federal range was placed within a grazing district after June 28, 1938, or added to an existing grazing district by boundary modification after the latter date, the priority period shall be the five years immediately preceding the date of the order establishing such district or effecting such addition, as the case may be.

(2) No land shall be considered as dependent by use unless offered as base property in an application for a grazing license or permit within one year after the date when the Federal range used in creating the dependency by use first became a part of a grazing district, except that if the Federal range used in creating the dependency by use became a part of a grazing district prior to June 28, 1938, such base property shall not be considered as dependent by use unless offered in an application for a grazing license or permit filed prior to said date. * * *

On this appeal to the Secretary from the Director's decision, the appellant contends that the adoption of the special rule was invalid, and that he is entitled to a decision on the merits of the examiner's decision. The only reason for deciding, on this appeal, questions raised by the appellant regarding the examiner's decision on the extent of the class 1 privileges to which the appellant was entitled during the 1953 and 1954 grazing seasons would be in order to establish what those privileges should be in future grazing seasons. If the regulatory provisions for determining prospective use have changed, there is, in this case, no point in deciding how the privileges should have been determined in the past.⁶ Accordingly, the first question to be decided on this appeal is whether the special rule for determining grazing privileges in this district provides for the award of grazing privileges in an authorized and reasonable manner.

The appellant contends that the special rule is invalid because it was not first published as a proposed rule in accordance with section 4 of the Administrative Procedure Act (5 U. S. C., 1952 ed., sec. 1003). The requirements of general notice of proposed rule making in section 4 are not applicable to the special rule here under consideration because the rule relates to the Federal range, which is public property, and matters relating to public property are expressly

⁶ As pointed out in footnote 5, the appellant has enjoyed up to now the grazing privileges exercised by him in 1952. Thus, up to now, he has not been hurt by the decision of the examiner. The determinations made in this decision will apply only to future grazing seasons as to which he has no vested rights.

excepted from the requirements of section 4 by the introductory paragraph of the section.

The appellant's next assertion that the adoption of the special rule is contrary to all principles of administrative rule making is also not meritorious. Section 2 of the Taylor Grazing Act expressly authorizes the Secretary to issue rules and regulations and to do any and all things necessary to accomplish the purposes of the act, including providing for the orderly use, improvement, and development of the range. The adoption of a special rule which departs from the general provisions of the Federal Range Code where unusual local conditions require such a rule to assure the proper administration and the orderly use of the range is a reasonable exercise of the rule making power. The departmental regulations (43 CFR, Part 161) governing use of the range and the granting of grazing privileges thereon, which comprise the Federal Range Code, have been revised from time to time since the enactment of the Taylor Grazing Act, but from 1935 one of the regulations has expressly authorized modification of any of the matters in the range code by the adoption of special rules for particular districts to permit flexibility of administration and accommodation to local customs and conditions.⁷

The record in this case contains substantial evidence that the orderly use of this range requires consideration of factors which are peculiar to the Malta Grazing District. Among these factors are the lack of record information required to administer the lands in accordance with the provisions of the code, the fact that the code was not followed in awarding grazing privileges in the area between 1936 and 1952; and the fact that livestock operators in the district are dependent upon use of the range to continue their operations which were developed in reliance upon awards of grazing privileges by the South Phillips district. The adoption of the special rule to govern the future award of privileges in this area is a way of trying to carry

⁷ The regulation governing special rules for grazing districts now in effect and in effect when the special rule was adopted (43 CFR, 1956 Supp., 161.16) provides that:

"Whenever it appears to a state supervisor after considering the recommendation of the district advisory board that local conditions in any district make necessary the adoption of a special rule on any of the matters in this part in order better to achieve an administration consistent with the purposes of the act, he may, with the concurrence of the Area Administrator, recommend such a rule, supported by a factual showing of its necessity, for the approval of the Director. Such rule, if approved, shall be published in the Federal Register."

Prior to January 22, 1956, when the current regulation became effective, the regulation (43 CFR 161.15) governing special rules for grazing districts provided:

"Whenever it appears to an area administrator that local conditions in any district in his area make necessary the application of a special rule on any of the matters in the Federal Range Code for Grazing Districts in order better to achieve an administration consistent with the purposes of the act, he may recommend such a rule, supported by a factual showing of its necessity, to the Secretary of the Interior for approval."

A regulation substantially identical with the 1954 provision has been a part of the range code since March 16, 1938 (see 43 CFR, 1940 ed., 501.15, renumbered 161.15, Circular 1630, December 11, 1946 (11 F. R. 14496)). Rules for the Administration of Grazing Districts, approved March 2, 1936, and May 31, 1935, contained general provisions authorizing special rules of range practice for local districts upon approval by the Secretary of the Interior.

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out the purposes and provisions of the act in a manner which recognizes the particular circumstances existing in the Montana grazing district.

In administering the provisions of the Taylor Grazing Act which permit use of the Federal range in grazing districts by livestock operators, the Department has attempted to conserve the public domain, to stabilize the livestock industry, and to make a fair distribution of range privileges to those persons engaged in the livestock business who are owners of commensurate property which is dependent on the public domain for proper use. Section 3 of the act provides that preference shall be given, in the issuance of grazing permits, to those persons within or near grazing districts who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights. Preference is to be measured by the amount of range which is necessary to enable the applicant to make proper use of the lands, water, or water rights owned, occupied, or leased by him. If there are insufficient grazing privileges to satisfy the needs of all those in the preferential class, that is, of all persons having dependent commensurate property, departmental regulations provide that applicants who have a priority of use in such range (use during a priority period set by regulation) are to be given an additional preference over applicants with dependent commensurate property which has not had priority of use.

The appellant objects principally to that portion of the special rule which changes the priority period, upon which preference in the award of grazing privileges is based, from the 1929-1934 period to the 5-year period immediately prior to 1953. He asserts that such a change is contrary to the preference right provisions of the act. Although the definition in the range code of "land dependent by use" now in effect adopts (with the exception of land added to a grazing district after June 28, 1938) the 5-year period immediately preceding June 28, 1934, as the priority period in determining who is entitled to preference in the issuance of grazing permits, there is nothing in the Taylor Grazing Act which requires that any priority period whatsoever be used as a criterion in determining whether an applicant is a qualified preference right applicant—i. e., whether he is one of the persons within or near a district who are "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights." The only time restriction in section 3 of the statute which is related to the issuance of preference permits is the provision that before July 1935, preference might not be given to persons whose rights in dependent property were acquired during the year 1934. Inasmuch as the Taylor Grazing Act became law on June 28, 1934, any notion of priority of use during the early years of the administration of the act necessarily referred to use of the range before 1934. However, the statute

itself does not require that prior use be recognized as one of the factors in determining the preference to be given landowners, occupants, or settlers or owners of water or water rights within or near a district to the extent necessary to permit the proper use of such lands, water or water rights. In fact, at one time, the Grazing Service questioned whether prior use of the range was a factor which was a valid basis for distinguishing between preference right applicants under the act (Solicitor's opinion, 56 I. D. 62 (1937)). Since 1936, departmental regulations have provided for one or more ways of altering the priority period in special circumstances such as may arise by modification of district boundaries or as a result of local conditions which make variation from the 1929-1934 period desirable,⁸ and if a new grazing district were established this year, the priority period would not be the 5-year period from 1929-1934, but rather the 5 years immediately preceding the date of the order establishing the district. Such regulatory provisions are patently inconsistent with a statutory requirement that a particular priority period be recognized in awarding preference right privileges. Accordingly, the appellant's contention that the special rule conflicts with the purposes of the Taylor Grazing Act because, under the act, the appellant is entitled as a matter of right to privileges as against persons who did not use the range during the period between 1929-1934 cannot be sustained. It may be noted that *Red Canyon Sheep Co. et al. v. Ickes*, 98 F. 2d 308 (App. D. C., 1938), upon which the appellant mainly relies in support of this contention, expressly recognizes that regulations issued pursuant to the act determine, in part, the qualifications of those persons who are entitled to preference in the issuance of permits under section 3 for use of the Federal range.⁹

⁸ Rules, approved May 31, 1935, governing issuance of grazing licenses, defined "prior use" as:

"use of the public land range according to local custom for grazing livestock prior to the year 1935. Recent use and consecutive use shall be given consideration in rating priorities."

Rules of March 2, 1936, governing grazing on public lands defined "priority of use" as:

"such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith."

The 1936 rules also authorized boards of district advisors for each of the grazing districts to make recommendations with regard to various matters, among them, the date before which the range must have been used by an applicant in order to constitute priority of use.

Rules for the administration of grazing districts, as amended June 14, 1937, authorized regional graziers to recommend a different period of use as a standard for the establishment of groups than that provided for by general rule, if the general rule were not suited to local conditions and would not permit an effective and orderly administration of the act (see *Joseph F. Livingston et al.*, 56 I. D. 92 (1937), and *ibid.*, p. 305). See 43 CFR, 1956 Supp., 161.2 (k) (1) and (2) and 162.16, quoted above, and corresponding provisions of the range code in prior editions of 43 CFR.

⁹ The decision states (at pp. 313-314) that Congress intended under the Taylor Grazing Act that "livestock owners, who, with their flocks, have been for a substantial period of time *bona fide* occupants of certain parts of the public domain, and who are able to make the most economic and beneficial use thereof because of their ownership of lands, water rights, and other necessary facilities, and who can thus bring themselves within a pre-

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An indirect consideration further reenforces the conclusion that the special rule does not conflict with the provisions of the Taylor Grazing Act—i. e., the same result as that which is intended by the adoption of the special rule could be accomplished by modifying the boundaries of Montana Grazing District No. 1, as authorized by section 1 of the act, and then establishing a new district, consisting of the lands in the Malta Grazing District which are within the operation of the special rule. If this action were taken, the priority period for determining preference in the issuance of grazing permits would be the 5-year period immediately preceding the establishment of the new district without the adoption of a special rule to that effect (43 CFR, 1956 Supp., 161.2 (k) (1), quoted above). Accordingly, it is concluded that neither the statute nor the regulations issued pursuant to it support the appellant's contention that he is entitled to statutory preference in the award of grazing privileges over persons who might have no priority of use if the priority period of 1929–1934 were used to determine preference.

The persons within or near a district who are entitled to preference in the issuance of grazing permits change over a period of time with changes in the ownership and occupancy of land, and it is probable that different persons will be entitled to a statutory preference if the 5 years preceding January 1, 1953, is used as a priority period, as provided by the special rule, than would be so entitled if 1929–1934 is used as the priority period. Such a change by special rule is not made in the absence of persuasive reasons for supposing that the purposes of the act can be better achieved by using a special rule than by not doing so. There are such reasons in this case. It is reasonable to assume that adoption of the special rule will cause less disruption to livestock operations in the area than would occur if an attempt were made to adjudicate privileges on the basis of use of the area between 1929 and 1934, and the Bureau believes that the adoption of the special rule will result in a more equitable distribution of grazing privileges in the district than would result if the 1929–1934 priority period were used. Moreover, there is substantial evidence that accurate and reliable information necessary for a fair determination of grazing privileges if 1929–1934 period were used as a priority period is not available.¹⁰

*ferred class under the regulations by which the Secretary [of the Interior] is authorized to implement in more detail the general policy of the Act, are entitled to grazing permits not exceeding ten years in duration, should the Secretary create a grazing district including that portion of the range which such livestock owners have been occupying. * * ** and

“ * * if the Secretary determines to set up a grazing district including lands upon which grazing has been going on, then those who have been grazing their livestock upon these lands and who bring themselves within a preferred class set up by the statute and regulations, are entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range. * * *” [Italics added.]*

¹⁰ A number of extremely difficult questions relating to lack of record information might be mentioned, but one example is illustrative of the type of questions raised. Uncontra-

Finally, it may be noted that the record indicates that Mr. McNeil will not be prejudiced by adoption of the special rule for determining grazing privileges in the area.

For these reasons, it is concluded that the special rule, approved June 19, 1956, for the Malta Grazing District is not invalid and is a proper method for determining grazing privileges in the district. Accordingly, the Director's decision that Mr. McNeil's appeal from that portion of the examiner's decision concerning the extent of grazing privileges to which the appellant is entitled is moot because of the adoption of the special rule, is correct.

Two other questions raised on appeal also require consideration. First, the assertion that the appellant is entitled to exclusive use of the range which was allotted to him in 1952 is incorrect. An applicant for grazing privileges is not entitled to graze on a particular area of public land solely because he has used the area over a long period of time (*M. P. Depaoli and Sons*, A-25978 (March 29, 1951)). Secondly, the conclusions by the examiner and the Director that the carrying capacity of the range here involved, as determined by range surveys of 1952 and 1953 by Bureau range conservationists, was properly used as the basis for allotment of this range were proper. A careful review of lengthy testimony and other evidence at the hearing on this question gives no indication of unfairness or discrimination or other reason for doubting the approximate accuracy of the Bureau's determination of carrying capacity, and in the absence of such evidence, that capacity, as determined by examination of the lands by qualified conservationists is accepted as correct. (*Fine Sheep Co.*, 58 I. D. 686, 691-693 (1944).)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,
Deputy Solicitor.

dicted testimony at the hearing suggests that, with the exception of written applications which livestock operators in the district filed in 1935 with the Bureau, written applications listing base property were not filed before the spring of 1944 and between 1936 and 1944 or 1945 grazing privileges were granted by the South Phillips district to some extent on the basis of oral requests and statements (Tr. 291-293; see 426, 451, 455). Such a practice raises a serious question as to whether most property in the area may have lost priority under the code because of the regulatory provision that failure to offer a base property in an application for license or permit for any 2 consecutive years results in loss of dependency by use or priority of such base property (43 CFR 501.6 (9) (approved September 23, 1942, 7 F. R. 7685), now amended and renumbered 43 CFR, 1956 Supp., 161.6 (e) (9) (i)). See also *James C. Boyd et al.*, A-25772 (January 12, 1951), holding that under the range code of March 16, 1938, grazing privileges on the Federal range could be granted only if a properly supported application had been filed for such privileges, and canceling a grazing permit to the extent that it awarded privileges not included in such an application.

*November 21, 1957***STATUS OF OZETTE RESERVATION, WASHINGTON****Indian Lands: Tribal Lands: Alienation**

An Executive Order reservation withdrawal from the public domain "For the Ozette Indians not now residing upon any Indian reservation" may be revoked if in fact there are no longer any living Indians identifiable as members of the Ozette Tribe. In such case, the equitable estates merge in the United States and the trust is terminated.

Indian Tribes: Reservations

Descendants of Ozette Indians who abandoned the reservation relinquished all rights thereon when they did not return to cast their votes to determine the future of the reservation lands when the election was held in 1935. It is believed that all those persons desiring to preserve a tribal relationship cast their votes in similar elections as residents of other reservations.

Indian Tribes: Reservations

The mere fact that the Ozettes were historically a branch or part of the Makah Tribe does not give the Makah Tribe any rights to the Ozette Reservation.

M-36456**NOVEMBER 21, 1957.****TO THE COMMISSIONER OF INDIAN AFFAIRS.**

You have requested my opinion on questions relating to the disposal of approximately 719 acres of land comprising the Ozette Indian Reservation, Washington. This reservation was created by Executive Order in 1893 for the Ozette Indians not then residing upon any Indian reservation.

At present, it is reported, there are no Indians residing on this reservation, although it appears that members of the Makah Tribe sometimes use the site for hunting, fishing and camping purposes. Since 1941, when the Makah Tribal Council passed a resolution (February 19, 1941) requesting the transfer of the reservation to the Makah Tribe, several plans for disposal of the Ozette Reservation have been considered. One of these was presented by the Superintendent of the Olympic National Park who recommended that action be taken to hold the area for an addition to the Olympic Acquisition and to be administered as a part thereof in order to preserve sea run salmon and cutthroat trout. This proposal was subsequently considered by the Secretary of the Interior, who on December 9, 1941, decided that no further action should be taken at that time to add the reservation land to the park.

In 1955 the Makah Tribal Council submitted for approval a resolution (No. 12, February 7, 1955) authorizing the expenditure of \$1,000 of tribal funds for the construction of a hunting lodge on the Ozette location. Approval was denied on the ground that no tribal funds should be used to make improvements on land until the tribe was found to have an equitable interest in the land.

There is now submitted for our consideration a petition wherein the Makah Indian Tribe has made a formal claim to the Ozette Indian Reservation. The petition requests the Commissioner "to set the reservation over to the Makah Indian Tribe, and make it a part of the Makah Indian Reservation." In support of its claim, the Makah Indian Tribe submits the argument that the Ozette Reservation "was created for Makah Indians living at Ozette Village, and those Indians were sometimes referred to and called Ozettes." The petition further states that over one-half of the Makahs on the tribal rolls today were either born at Ozette or are direct descendants of persons born at Ozette.

The tract of land with which we are concerned is located near an old Indian fishing village at the mouth of the Ozette River. It was withdrawn from public entry and reserved for the Indians by President Grover Cleveland on April 12, 1893, by Executive Order, which reads:

It is hereby ordered that the following described lands, situated and lying in the State of Washington, viz.: Commencing at Point Apot-Sloes (Indian name), on the ocean beach about one-half a mile north of the Indian village Osette in Clallam County, said State; thence due east one mile; thence due south to the point of intersection with the southern boundary line of the said Indian village extended eastward, and the northern boundary line of Charley Weberhard's claim; thence due west to the Pacific Ocean; thence with the Pacific Ocean to the point of beginning, be, and the same are hereby, withdrawn from sale and settlement and set apart as a reservation for the Osette Indians not now residing upon any Indian reservation: *Provided, however,* That any tract or tracts, if any, the title to which has passed out of the United States, or to which valid legal rights have attached under existing laws of the United States providing for the disposition of the public domain, are hereby excepted and excluded from the reservation hereby created. [1 Kappler 920.]

The lands involved here, as in the case entitled *United States v. Santa Fe Pacific Railroad Company*, 314 U. S. 339 (1941), were a part of the ancestral home occupied by the Indian claimants. There were several such fishing sites which had been used from time immemorial by the various bands of the Makah Tribe. Such occupancy constitutes "Indian title." *United States v. Shoshone Tribe*, 304 U. S. 111 (1938); *Mitchel v. United States*, 9 Pet. (34 U. S.) 711 (1835). An examination of the treaty with the Makahs made January 31, 1855 (12 Stat. 939), clearly shows that the Ozette Indians were a part of the Makah Tribe. However, under article 1 of the 1855 treaty, *supra*, the Makah Indians relinquished all their right, title and interest in and to the lands and country formerly occupied by them, for a designated tract of land set apart as the Makah Reservation. Likewise, all of the Ozettes who subsequently left the original fishing village as a result of the signing of this treaty, and removed to the Makah Reservation established under article 2 thereof, relinquished any tribal claims which they might have maintained outside that reservation. Cf. *United States v. Santa Fe Pacific Railroad Company, supra*, page 357. With this view, we here take a different position from that expressed on November 26, 1941, by the Chief Counsel

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of the Bureau of Indian Affairs in an informal memorandum opinion concerning the rights of Ozette Indians in the Ozette Reservation. He then stated:

While an Indian, of course, is not entitled to an allotment with more than one tribe or on more than one reservation, yet these small village sites were never intended for allotment purposes, do not contain sufficient area to justify allotment in severalty and remain tribal property of the Indians formerly using or occupying those sites.

With this background, as I see it, the Ozette Reservation remains the tribal property of the Indians of this band who are mostly of Makah blood, as I understand it, and who equally have a right to participate in the disposition of the tribal asset at Ozette, if and when disposition is to be had, regardless of the fact that such Indians may have received allotments elsewhere as a Quinalt or Makah.

When the Ozette lands were recommitted to Indian occupancy by the order of April 12, 1893, the recognizable right of use was accorded only to "Osette Indians not now [1893] residing upon any Indian Reservation." The character of title acquired by these Indians in lands withdrawn for their benefit by the Executive Order was the same right to possess and occupy the lands for the purposes designated as was granted to other tribes by treaty. *Spalding v. Chandler*, 160 U. S. 394, 402, 403 (1896).

There is no doubt that the Executive Order has never been revoked or superseded by legislation extinguishing the rights of the Indians for whom the reservation was created. However, it now appears that there are no longer representatives of the class designated. The records show that all Indians enrolled as Ozettes are now deceased. Most of the families who occupied the reservation as a permanent residence, left the site about 1903 when, due to a lack of school facilities, the Government insisted that the young children go to school in Neah Bay. These children were subsequently enrolled in other tribes on the Makah Reservation and elsewhere.

On April 13, 1935, two Indians, constituting the total population remaining on the Ozette Reservation, voted to accept the provisions of the Indian Reorganization Act of June 18, 1934, and in doing so, they accepted the provisions of that portion of the act now codified as section 461 of Title 25, U. S. C., which provides that the land of the reservation should not thereafter be allotted in severalty. Since the land within the Ozette Reservation had not been allotted prior to acceptance of the Indian Reorganization Act, the entire beneficial interest was preserved for the tribal community or its successor, and not in any group of Indians individually. Therefore, no persons other than members of an Ozette Tribe can be recognized as having rights therein.

Now, in answer to the specific questions you have presented, my opinion is as follows:

1. Are there any classes of persons who could successfully exercise a valid claim to the Ozette Reservation?

Indians organized as an Ozette Tribe, pursuant to the 1934 act, could exercise a class claim to the Ozette Reservation. None of the Indians who now use the site of the Ozette Reservation, whether they be descendants of Ozette Indians or of other bands and tribes, are members of a recognized Ozette Tribe. Therefore, no group now in existence can be said to have such beneficial ownership right in the land as would be sufficient, without further act of Congress, to support a claim against the United States. See Sol. Op. M-36413, February 8, 1957.

If in fact there are no living Indians identifiable as Ozettes, then the purposes of the trust under the Executive Order setting apart the Ozette Reservation have been fully carried out. The records of the Indian Bureau show that this is the situation. In such a case the entire legal and equitable estates merge in the United States (the trustor-trustee) and the trust is terminated, there being no one other than the trustee to whom the property could go by way of resulting trust or other theory. 54 Am. Jur. 86, 99. *Quapaw Tribe et al. v. United States*, 120 F. Supp. 283, 286 (1954).

2. Does the Makah Tribe of Indians have an enforceable property or use claim to the lands or waters within the Ozette Reservation?

No. In my opinion, there are no outstanding enforceable Indian rights to the Ozette Reservation. Descendants of Ozette Indians who abandoned the reservation relinquished all rights thereon when they did not return to cast their votes to determine the future of the reservation lands when the election was held in 1935. It is believed that all those persons desiring to preserve a tribal relationship cast their votes in similar elections as residents of other reservations. The mere fact that the Ozettes were historically a branch or part of the Makah Tribe does not give the Makah Tribe any rights to the Ozette Reservation.

3. If there is no person or organization which can exercise a valid claim to the reservation, what is the reservation's status? That is, is it, or can it become an Indian reservation, public domain, or "property" as defined in the General Services Act?

The Ozette Reservation is and will continue to be an Indian reservation until returned to the public domain or otherwise disposed of by Congressional action. It is axiomatic that a withdrawal of public lands by Executive order does not terminate merely because the purpose of the order may have become obsolete. See Sol. Op. M-36078,

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May 16, 1951. The order setting the Ozette Reservation apart for the use of a certain group of Indians, although possibly obsolete, is still in effect.

Under the provisions of section 3 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U. S. C. 471 *et seq.*, which now governs the disposal of Government property, certain controlling definitions are given.

(d) The term "property" means any interest in property of any kind except (1) the public domain (including lands withdrawn or reserved from the public domain which the [General Services] Administrator, with the concurrence of the Secretary of the Interior, determines are suitable for return to the public domain for disposition under the general public land laws because such lands are not substantially changed in character by improvements), and lands reserved or dedicated for national forest or national park purposes; * * *.

We understand that the character of the land has not been substantially changed by reason of improvements, therefore, the provisions for disposal contained in the Federal Property and Administrative Services Act of 1949 do not apply.

It is our opinion that the Ozette Reservation falls within exception (1) to the section quoted above, inasmuch as it was created by a withdrawal from the public domain. On revocation of the 1893 order, the lands will be returned to the public domain for disposition or administration under the applicable public-land laws. For the reasons stated above in my opinion, returning these lands to the public domain is not contrary to the high standard of fair and honorable dealings required in Indian matters.

4. In view of the act of March 3, 1927 (44 Stat. 1347; 25 U. S. C. sec. 398d), can the reservation be disposed of by any means other than by an act of Congress?

I have considered section 4 of the act of March 3, 1927, *supra*, and believe it to be inapplicable to this situation. Section 4 must be read in context, and the act as a whole relates to the leasing of Executive Order Indian reservations for oil and gas mining purposes. The legislative history of the act shows that the language of section 4 was intended merely to provide a limitation on the enlargement of such reservations in accord with the prior act of June 30, 1919 (41 Stat. 3-34), which prohibited the further creation of extensive reservations except by act of Congress. Senate Rept. 1240, 69th Cong., 2d Sess. While a special act of Congress would be the most satisfactory method of handling this disposal, the withdrawal order may be revoked and disposal effected under public land laws.

5. Can the Reservation be transferred to the National Park Service? If so, under what authority and condition?

The Park Service has not recently renewed its request for this land, and as long as the 1893 order is still in effect, we do not wish to un-

dertake a consideration of whether the direction over these lands can be transferred to the National Park Service.

EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF AAA CONSTRUCTION COMPANY

IBCA-55

Decided November 26, 1957

Contracts: Changed Conditions—Contracts: Changes and Extras—Contracts: Substantial Evidence—Rules of Practice: Evidence

When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.

Contracts: Damages: Liquidated Damages—Contracts: Unforeseeable Causes

When from the reported circumstances in documents in the appeal file, it may be inferred that two hurricanes, each of which lasted approximately one day, caused difficulties that delayed the work by approximately 2 days in the aggregate, such delay was excusable and the contractor is entitled to an extension of the time for performance of 2 days.

Contracts: Suspension and Termination

When a contractor breaches a contractual guaranty, by failing to remedy faulty materials or workmanship within 1 year following the Government's final acceptance of the work, the contracting officer, under the standard form of Government construction contract, is entitled to terminate the contractor's right to proceed, to have the necessary repairs made, and to assess their cost against the contractor.

BOARD OF CONTRACT APPEALS

This is a timely appeal from the findings of fact and decision of the contracting officer¹ under Contract No. 14-19-008-2256, dated August 2, 1954 (Invitation No. FW5-1974), with the Fish and Wildlife Service.

In its notice of appeal dated September 27, 1955, the contractor stated that "no useful purpose will be served in attempting at this time to set forth a detailed explanation of our position." It also stated, in connection with the claim for furnishing of treated paper under structures, that "we reserve the right to confront these representatives [referring to those in charge of the project] in an open

¹ The findings are undated, but were sent to the contractor by the contracting officer with a covering letter dated September 2, 1955.

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hearing for determining this matter," and in connection with the claim for an extension of time, that "we are fully prepared to defend our position in this matter." By letter dated November 13, 1956, to the contractor (a copy of which was sent to the attorney who had handled the claims before the contracting officer), the Board asked that two suggested hearing dates be given to the Board and that if the contractor did not wish "a hearing for the presentation of evidence or oral argument, the Board will determine the appeal on the basis of the appeal file." Neither the contractor nor the attorney responded to this letter, and no additional documentary evidence has been submitted in support of any of the claims. The appeal will, therefore, be decided on the record.

The contract was on U. S. Standard Form 23 (Revised March 1953), and incorporated the General Provisions of U. S. Standard Form 23A (March 1953). It provided for the construction, including excavation, of reinforced concrete fish raceways, together with appurtenant road work and an asbestos cement pipeline for supplying water to the raceways, at the United States Fish Cultural Station, North Attleboro, Massachusetts. The consideration stated in the contract for the work specified was \$20,125.

The contract required the contractor to start the work within 10 calendar days after date of receipt of notice to proceed and to complete the work within 120 calendar days after receipt of notice to proceed. The contractor acknowledged receipt of notice to proceed on August 20, 1954. Thus the date for the completion of the work under the contract became December 18, 1954. The work appears to have been completed by December 17, 1954, but it proved impracticable to test the pipeline under operating pressure at that time, and the work was suspended from December 17, 1954, until February 9, 1955, pursuant to a provision of Section 20 of the General Conditions of the specifications. On February 9, 1955, inspection of the work under the contract was made; a leak was discovered in the pipeline; this was repaired by the contractor; a second leak was then found; this was likewise repaired; further operational tests were made on February 14, 1955; and at that time the pipeline was found satisfactory. Therefore, the work was accepted as meeting all contractual requirements as of the latter date, which was 5 days after the expiration of the time allowed by the contract for performing the job.

In the decision appealed from, the contracting officer denied four claims for additional compensation, and one for an extension of time, which had been previously presented by the contractor. The amounts involved total \$3,542. Each claim will be discussed in the order of its consideration by the contracting officer.

1. *Latent Soil Conditions*

This claim, which totals \$1,400, is based on the theory that in excavating for the pipeline the contractor encountered latent physical conditions of so unusual a nature as to constitute "changed conditions" under clause 4 of the General Provisions of the contract. The claim is itemized as follows:

55 c. y. of stone at \$5.00 per c. y.-----	\$275.00
55 c. y. extra trenching at \$3.00 per c. y.-----	165.00
6000 f. b. m. of sheathing-----	960.00

The contractor, by an undated letter (received November 17, 1954) addressed to the Regional Director of the Fish and Wildlife Service at Boston, Massachusetts, who was the authorized representative of the contracting officer, stated that it was impossible to set the pipe upon a firm base with materials on the site, because a *boiling condition* was encountered and a spongy bottom was found, and that the stone, extra trenching, and sheathing were needed to overcome these conditions. Under date of March 29, 1955, the contractor stated that after completing the excavation work to the elevation shown on the plans, it found soil conditions not contemplated by the parties which were sometimes in the nature of *quicksand*, and which required the additional work and materials covered by this claim. The findings of fact state that the conditions mentioned in the two letters of the contractor were observed by the Government engineer.

The contracting officer found that a cursory observation of the work area would have disclosed even to an inexperienced contractor that the water table was high at the job site, that the work area was bisected by a brook, and that parts of the area were so marshy that surface water was present at all times. The exact nature of the sub-soil conditions and the extent of their variation from what was observable at the surface or foreseeable from observation of surface conditions are impossible to ascertain from the record before the Board. The record is too vague as to what the site was and what was capable of being seen and learned through a site investigation for the Board to determine that the contractor encountered sub-surface conditions which were materially worse than those inferable from the surface conditions and from the contract drawings. The contractor has the burden of proving that a "changed condition" did exist, and that the findings of fact of the contracting officer to the contrary are erroneous. Mere assertion of the existence of such conditions does not constitute evidence thereof and the record is insufficient to enable the Board to say that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated conditions such as were actually encountered. This claim, therefore, must be denied for want of proof.

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2. *Furnishing of Paper Under Structures*

This claim, in the amount of \$90, is to cover the cost of placing 4,500 square feet of treated paper under the raceway structures. This paper was placed in order to prevent the spring and surface water encountered in the area from erupting through the newly-laid concrete. The contractor contends that the use of the treated paper was required by verbal orders of Government personnel, but the contracting officer determined otherwise. He found that when the contractor complained to the Government inspector that water was causing difficulties in pouring cement, the inspector informed the contractor that the method employed by other contractors to control such flows was to place treated paper under the structures, but did not order the contractor to use treated paper, and that when the contractor mentioned this matter to the Government engineer, the latter stated that the paper was not a requirement of the contract and that the contractor's election to make use of it would be at its own responsibility and expense.

In the absence of any showing that the contracting officer erred in finding that no order to use treated paper was given the contractor, this claim must also be denied for want of proof.

3. ROAD FILL

This claim is in the total amount of \$1,112.00, itemized as follows:

Road fill 550 c. y. at 80¢ per c. y.-----	\$440.00
Hauling outside of 1000 ft. limit-----	432.00
Translocator at \$80.00 per day-----	240.00

Part of the claim is based on the assertion that Government personnel required the contractor to obtain road fill from sources other than the Government-owned area mentioned in section IV of the Technical Specifications. The pertinent provisions of that section are as follows:

There is available in the pond area, south of Mansfield road, adequate solid fill which the contractor may use, or, if he prefers, he may supply same. Fill material, if supplied by the contractor, shall be equal or better than the material from the Government pit which will be considered adequate in quality for the road surfacing.

The contracting officer found that of the 550 cubic yards of road fill listed in the contractor's claim, approximately 150 cubic yards were taken from the Government pit for use on the road area and approximately 400 cubic yards were used by the contractor in building, for its own convenience, a road to the job site and footings for its equipment. He also found that "at no time was the material located at the Government pit rejected by Government personnel," and that to the extent fill was obtained from sources other than the Government

pit, it was because the contractor voluntarily chose to do so pursuant to the option allowed it by section IV.

This part of the claim must be rejected because there is no substantial evidence in the record to establish that these findings are erroneous.

The remainder of the claim is based on the assertion that Government personnel required the contractor to dispose of debris from the clearing of the work site, or other contract operations, in ways that were not compatible with the terms of the contract. Since the contractor complains that it was required to move material for more than a thousand feet, it would seem that it considers the governing provision to have been section III of the Technical Specifications which, in pertinent part, reads as follows:

Excavated materials in excess of that needed for grading shall be disposed of by the contractor on the hatchery grounds, at waste areas selected by the Hatchery Superintendent, but not more than one thousand feet (1,000') measured in a straight line from the point of excavation.

The contracting officer seems to take the position, on the other hand, that the governing provision was section XV of the Technical Specifications, reading as follows:

Upon completion of the construction, all equipment and excess material shall be removed from the job site.

For the purposes of this appeal it is unnecessary to determine whether the debris in question, which appears to have consisted chiefly of logs, trees, brush and stumps, constituted "excavated materials" within the meaning of section III or "excess material" within the meaning of section XV. In no event would the contractor be entitled to be compensated for work done by it in excess of the contract requirements without establishing that such work was authorized, ordered, or necessitated by some instruction or act of an authorized representative of the Government. This is not here shown to have been the case.

The contracting officer did find that Government personnel instructed the contractor not to dump stumps on the quarters area of the fish cultural station, and also instructed the contractor to remove trees and brush that it had previously pushed over to the edge of the work area. While these instructions may have been predicated on the view that section XV was the controlling provision of the contract, they are on their face also consistent with the view that section III was the controlling provision, since that section did not sanction the dumping of "excavated materials" anywhere the contractor might choose within 1,000 feet of the point of excavation, but only "at waste areas selected by the Hatchery Superintendent" within such 1,000 feet. Even if things such as stumps or brush were to be considered as outside the scope of both of these sections, there

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is nothing in the contract that would give the contractor the unqualified right to leave them at locations where they might incommode the station operations.

The contractor contends, indeed, that it was ordered by the Hatchery Superintendent, or other Government personnel, to remove some or all of the material in question entirely off the hatchery grounds and to dump it, either wholly or in part, at a location 7 miles distant. These contentions, however, are not supported by any substantial evidence in the record, and, therefore, the claim based upon them must likewise be rejected.

4. Removal of Trees

This is a claim for extra work in the amount of \$840 for the removal of 12 trees, said to be approximately 18 inches in diameter, at a cost of \$70 per tree, which work was allegedly ordered by the Government inspector because the trees had been felled by hurricanes.

The contracting officer specifically found that "there were no such number of trees nor were there any such dimensions." It is, moreover, evident from his comments that he was of the view that the only trees removed were those which needed to be removed in order for the contractor to perform its obligation of clearing the work area.

As the contractor has adduced no proof in support of its contrary contentions, this claim must also fail.

5. Extension of Time

This claim is for an extension of 5 days because of time allegedly lost in the performance of the work due to the 1954 hurricanes known as Carol and Edna. The contractor, as has been seen, was 5 days late in completing the work, and for this delay has been assessed liquidated damages at the rate of \$20 a day, or a total of \$100, in accordance with section 27 of the General Conditions and paragraph 5 of the Special Conditions. Clause 5 (c) of the General Provisions provided that any delay to be excusable must have been "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor."

The contracting officer found that there was no indication that any time had been lost by the contractor because of hurricanes Carol and Edna. He appears to have reached this conclusion on the ground that actual construction work did not begin until the day after hurricane Carol occurred, and that the clearing of trees from the work area had been completed when hurricane Edna occurred. This reasoning is not particularly convincing. Carol might have created debris which made the task of clearing the work area more time-consuming than it otherwise would have been, and Edna might have damaged work already performed or put obstacles in the way of work yet to

be done. But these are mere possibilities, and the burden of proving them is upon the contractor.

The Board has scrutinized the documents contained in the appeal file for the purpose of ascertaining whether they indicate that any part of the 5 days' delay in completing the work was caused by either of the hurricanes or by the effects thereof. From the reported circumstances it may fairly be inferred that the two storms, each of which was of approximately 1 day's duration, caused difficulties that put the work back by approximately 2 days in the aggregate, and entitle the contractor to a corresponding extension of time. Granting of this extension will necessitate a reduction of \$40 in the amount assessed as liquidated damages. The remainder of the claim for an extension of time must fail for want of proof.

6. *Drain Repairs*

In the decision appealed from, the contracting officer not only denied the five claims asserted by the contractor, but also found that there should be deducted from the payments otherwise due the contractor, the sum of \$760.39 to cover costs incurred by the Government in repairing a transverse drain that formed part of the raceway structures.

The contractor in its appeal letter expressly commented upon each of the five claims it had asserted, but made no specific mention of the repair costs thus assessed against it. The letter, however, stated that the contractor did not consider the decision to constitute a factual finding within the meaning of the contract, and that the contractor was not attempting to set forth a detailed explanation of its position in the letter, but, instead, was merely making some observations on the items under controversy. While the letter is ambiguous, the Board believes that a letter of appeal in an administrative proceeding of this kind should be construed broadly in order to make possible an equitable determination of the questions on which the parties are in dispute. Department Counsel, in stating the Government's position, has interpreted the appeal as comprehending the dispute concerning the assessment against the contractor of the costs of the repair job, and the Board comes to the same conclusion.

During the early part of May 1955, or, in other words, approximately 3 months after the final acceptance of the work, Government personnel discovered what they considered to be defects in the floor of the transverse drain at the lower end of the raceway structures. The conditions discovered were brought to the attention of the contractor and he was requested, both orally and in writing, to remedy them.² The contractor declined, however, to do this work, except on a reimbursable basis, because it considered that the defects were

² The written request was contained in a letter from the Regional Director dated June 17, 1955.

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not due to any faulty construction on its part.³ Thereafter, on June 28, 1955, the contracting officer notified the contractor by registered mail, with a request for a return receipt, that pursuant to the General Provisions of the contract, its right to proceed under the contract was terminated and that the "Government will take over and prosecute this work to completion and will bill you and your surety for the cost thereof." The repairs were thereupon made by Government employees.

With respect to the existence of deficiencies in the drain, the contracting officer, in his decision, found that:

Under date of May 10, 1955, Government personnel, while working the raceway, reported a leak caused by faulty construction. Later investigation disclosed that the workmanship and materials in the floor of the transverse drain at the end of the raceways was not in accordance with the specifications. The concrete was not of the required thickness in spots and was of such poor quality that it crumbled, broke or fell. Sections of the concrete floor was washed out and completely disappeared. Approximately 80% of the floor had failed at the time repairs were instituted.

He also found that the cost incurred by the Government in correcting the deficiencies was \$760.39.

The appeal file contains accounts of the discovery and repair of the leak, prepared at the time of these events by the Government personnel on the job, that corroborate the foregoing findings. Included in it is a memorandum from the Superintendent of the Fish Cultural Station to the Regional Director, dated May 10, 1955, which, in addition to explaining the faulty condition of the drain, gives a reason why this condition was not earlier discovered. This reason was that previously the foot of the raceways had been closed by damboards, with dirt piled against them, and that when, in the course of operating the raceways, these obstructions were removed, the leak was revealed.

The contractor's assertion that the drain was properly constructed in conformity with the specifications is, on the other hand, entirely unsupported.

In this state of the record, it seems obvious that the contracting officer's assessment and deduction of repair costs in the amount of \$760.39 must be affirmed. The defects in the drain were discovered within 1 year after acceptance of the work. Therefore, they are covered by section XVI of the Technical Specifications, which provides as follows:

Neither the final certificate nor payment nor any provision in the Contract Documents shall relieve the Contractor of responsibility for faulty materials

³ The contractor's letter dated June 20, 1955, in reply to the Regional Director's letter of June 17, 1955, stated that " * * * there was no deficiency in the construction of the drain. All work was carried out according to the specifications drawn up by your own engineers. * * *"

or workmanship and, unless otherwise specified, he shall upon notification immediately remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one year following acceptance by the Government.

When the contractor failed to remedy the defects in the drain, after notification to do so, it breached the foregoing guaranty. Upon such breach, the contracting officer was entitled to terminate the contractor's right to proceed, to have the necessary repairs made, and to assess their cost against the contractor, by virtue of sections 5 (a) and 9 (a) of the General Provisions of the contract.

It follows that the appeal from the deduction of the repair costs must be denied.

With the one exception previously mentioned in connection with the claim for an extension of time, all the claims of the contractor must fail because it has not met the burden imposed on it of establishing the validity and amounts of its claims by substantial evidence. Ordinarily, mere statements in claim letters are not sufficient proof of essential facts which are disputed.⁴ Moreover, the contractor declined the opportunity to present evidence at a proposed hearing before the Board.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the contracting officer is directed to issue an appropriate order extending the time for performance of the contract by 2 calendar days, and the decision of the contracting officer denying the claims of the contractor, as modified by the foregoing direction, is affirmed.

THEODORE H. HAAS, *Chairman*.

We concur:

WILLIAM SEAGLE, *Member*.

HERBERT J. SLAUGHTER, *Member*.

⁴ *La Societe Nationale De Construction v. United States*, 149 F. Supp. 335, 339 (Ct. Cl. 1957); *Zinsco Electrical Products, IBCA-104* (June 3, 1957); *Pappin Construction Company, Eng. C&A No. 1120* (September 23, 1957); *Precision Scientific Company, ASBCA No. 2804* (September 15, 1955).

APPEAL OF CHAS. I. CUNNINGHAM CO.**IBCA-60***Decided December 6, 1957***Contracts: Damages: Liquidated Damages—Contracts: Unforeseeable Causes**

Failure by a contractor to prosecute the contract work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the contractor to extensions of time for such parts of the ultimate delay in completion as are attributable to events, such as acts of the Government or strikes, that are excusable under the terms of the contract.

Contracts: Contracting Officer—Contracts: Unforeseeable Causes

Under the "disputes" clause of the standard-form Government construction contracts, the contracting officer has the responsibility of apprising the contractor of the basis for his decision, and under the "delays-damages" clause, he has the further responsibility of making findings of fact with respect to the circumstances and extent of alleged excusable causes of delay.

Contracts: Acts of Government—Contracts: Unforeseeable Causes

The presence in a contract of specifications that necessitate reference to the catalogs of various dealers in order to identify the types, styles and sizes of required articles constitutes an excusable cause of delay if the specifications are ambiguous, by reason of such circumstances as the use by a named dealer of the same number to designate different articles in different catalogs, but not if the specifications are unambiguous.

Contracts: Acts of Government—Contracts: Unforeseeable Causes

The issuance by authorized Government personnel of instructions or requests that progress of the contract work be held up while consideration is being given to the advisability of making changes in the specifications constitutes an excusable cause of delay.

Contracts: Interpretation—Contracts: Release

Acceptance by a contractor of a change order which stipulates that no increase in the contract performance time will be allowed "on account of the performance" of the work described in the order does not bar the allowance of an extension of time on account of delays caused by the action of the Government in holding up the job while the advisability of ordering such a change was being considered.

Contracts: Acts of Government—Contracts: Unforeseeable Causes

Delays in the completion of a building caused by the issuance of Government purchase orders that necessitate deferment of completion of the building until the articles specified in the orders can be procured and installed are excusable.

BOARD OF CONTRACT APPEALS

Chas. I. Cunningham Company of Oakdale, California, has filed a timely notice of appeal, dated November 7, 1955, from a decision

of the Acting Regional Director of the Fish and Wildlife Service at Portland, Oregon, dated October 7, 1955, in which the Acting Regional Director denied a request of appellant for an extension of time and cancellation of liquidated damages. Neither party has requested a hearing and, therefore, the appeal will be decided on the basis of the record.¹

The dispute arises under a contract with the Fish and Wildlife Service for the construction of a concrete block residence at Colusa National Wildlife Refuge, Colusa, California, for a consideration of \$14,500. The contract is on Standard Form 23 (Revised March 1953), incorporates the General Provisions of Standard Form 23A (March 1953), and is dated October 19, 1954.²

The contract provided that the work should be commenced within 10 calendar days from the date of receipt of the notice to proceed and should be completed within 120 calendar days from that date. The notice to proceed was received by appellant on January 20, 1955, and the completion date thereby became May 20, 1955. Extensions of time aggregating 15 days were allowed by suspension of work and change orders, thereby deferring the completion date to June 4, 1955. The work, however, was not accepted as complete until 53 days later, that is, on July 27, 1955. Under the terms of the contract, appellant was chargeable with liquidated damages, at the rate of \$20 per day, for each of these 53 days, unless the delay in completion was excusable.³

By a letter dated August 12, 1955, appellant requested that it be allowed an additional extension of time in the amount of at least 66 days, and that no liquidated damages be assessed against it for failure to complete the work on time. This request was denied by the Acting Regional Director in the decision that forms the subject of this appeal. In it he ruled that there was nothing of record which would indicate that the contractor was entitled to an extension of time, and that liquidated damages were assessable for the full 53 days of delay, or a total of \$1,060.

The decision is entitled "Findings of Fact," but, in the main, is a statement of conclusions, rather than of the facts from which the con-

¹ The Board, by a letter of February 11, 1957, informed counsel for appellant that the appeal would be decided on the basis of the existing record unless the Board was advised that appellant desired to substantiate the appeal. No response to this letter has been received.

² The officer who executed the contract was the Chief, Branch of Finance and Procurement, Fish and Wildlife Service. The contracting officer, shortly after executing the contract, designated the Regional Director, Fish and Wildlife Service, Portland, Oregon, as his duly authorized representative. Pursuant to this designation the actual administration of the contract was handled by the Regional Director, together with his subordinates, and the decision appealed from was rendered by the Acting Regional Director in the capacity of authorized representative of the contracting officer.

³ Clause 5 of the General Provisions; section 26 of the General Conditions; section 5 of the Special Conditions.

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clusions were drawn. Relief appears to have been denied primarily on the grounds that "the Contractor did not diligently pursue work on this contract," and that "lack of planning by the Contractor occasioned many of the delays encountered." The only circumstances cited in support of these findings are that, according to the inspector's log, no work was performed at the construction site on 91 days out of the 178 which elapsed between January 31, the date when the suspension of work was lifted, and July 27, the date when the job was accepted as complete; * that, according to the log, work was performed at the site on only one day during the period from April 1 to May 15; and that, according to the inspections made by the Regional Engineer, "very little work" was accomplished between March 30 and May 25. These statistics, however, are as consistent with the view that appellant was delayed by circumstances for which it was not responsible as they are with the view that appellant was delayed by its own want of diligence or lack of planning.

The truly crucial issue is what was the reason why appellant did not work at the times mentioned by the inspector and the Regional Engineer. Was it because the construction of the residence had progressed to a stage where no further work of consequence could be done until a cause of delay for which appellant was not responsible had been removed? Or was it because of some inexcusable occurrence? The statistics cited in the decision point up the significance of this issue; they do not give the answers.

It is also worthy of note that some of the principal grounds advanced by appellant as a basis for the requested extension of time are nowhere examined, weighed, or refuted in the decision. While in part this may have been because not all of the grounds were fully and clearly explained in appellant's letter of August 12, 1955, nevertheless some that were there explicitly asserted, such as a teamsters' strike, are not even mentioned in the decision. Thus, it could be questioned whether all of the claimed causes of delay were considered and evaluated by the Acting Regional Director.

It is well settled that the failure of a contractor to prosecute the contract work with the efficiency and expedition requisite for its completion within the time specified by the contract does not, in and of itself, disentitle the contractor to extensions of time for such parts of the ultimate delay in completion as are attributable to events that are themselves excusable, as defined in clause 5 (c) of the General Provisions of the standard-form Government construction contract here

*The 91 days listed by the inspector as days on which no work was done include 44 Saturdays or Sundays and one holiday.

involved.⁵ Where a contractor finishes late partly because of a cause that is excusable under this provision and partly because of a cause that is not, it is the duty of the contracting officer to make, if at all feasible, a fair apportionment of the extent to which completion of the job was delayed by each of the two causes; and to grant an extension of time commensurate with his determination of the extent to which the failure to finish on time was attributable to the excusable one. Accordingly, if an event that would constitute an excusable cause of delay in fact occurs, and if that event in fact delays the progress of the work as a whole, the contractor is entitled to an extension of time for so much of the ultimate delay in completion as was the result or consequence of that event, notwithstanding that the progress of the work may also have been slowed down or halted by a want of diligence, lack of planning, or some other inexcusable omission on the part of the contractor.⁶

It is also well settled that under the "disputes" provisions of clause 6 of the standard form contracts, the contracting officer has the responsibility of apprising the contractor of the basis for his decision, and that under the extension of time provisions of clause 5, the contracting officer has the further responsibility of making findings of fact with respect to the circumstances and extent of alleged excusable causes of delay.⁷

Measured against the principles of law outlined in the two preceding paragraphs, the decision appealed from appears to be an inadequate determination of the matters in dispute. In the circumstances here involved, the issues of fact presented by the appeal cannot now

⁵ Clause 5 (c) reads as follows:

"(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: *Provided*, That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof."

⁶ *Robinson v. United States*, 261 U. S. 486 (1923); *Sun Shipbuilding Co. v. United States*, 76 Ct. Cl. 154, 173-74, 184-88 (1932); *Peter Kiewit Sons' Co.*, 34 Comp. Gen. 230 (1954); *Barnard-Curtiss Co.*, 8 Comp. Gen. 530 (1929); *Central Wrecking Corp.*, 64 I. D. 145, 159-161 (1957).

⁷ *Allied Contractors, Inc. v. United States*, 129 Ct. Cl. 400, 406-07 (1954); *Polaron Products, Inc. v. United States*, 126 Ct. Cl. 816, 825-26 (1953); *Kilgore v. United States*, 121 Ct. Cl. 340, 371-72 (1952); *Climatic Rainwear Company, Inc. v. United States*, 115 Ct. Cl. 520, 558-60 (1950).

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be considered by the Board on their merits, and the appeal file must be remanded to the contracting officer for the making of new findings of fact.

There remains, however, the further question of whether the allegations in the notice of appeal state grounds on which an extension of time could be allowed, should the contracting officer find appellant's contentions to be a correct statement of the facts.⁸ These allegations can be summarized by saying that appellant claims its work was delayed in four respects by acts of the Government, and in a fifth by a strike. The legal excusability of each of these five asserted causes of delay will be examined below.

I

The first alleged ground for an extension is that the specifications relating to various key items of material for the residence were written in a way that made it necessary for appellant to obtain and consult the catalogs of certain eastern manufacturers and suppliers, some of whom had no outlets west of the Mississippi, in order to identify the type, style and size of such articles or of acceptable substitutes therefor.⁹

These portions of the allegations do not comprehend the essentials of an excusable cause of delay within the meaning of clause 5 (c). The specifications for a number of items of material which the contract required appellant to procure and install were written in terms of particular products of particular dealers. These items were designated in the specifications by the name of the dealer, followed by either a catalog number, a brand name, or some other data for identifying the product. Section 27 of the specifications listed all of the dealers whose products were so mentioned and either gave their addresses, three of which were in the eastern part of the country, or stated that they had local representatives. In short, it was readily apparent on the face of the specifications that the successful bidder, in order to perform its obligations under the contract, would need to do precisely what appellant claims it did, that is, obtain and consult the catalogs of a number of manufacturers or suppliers, including certain eastern firms without local outlets. This need thus was a circumstance which appellant should have anticipated, and taken into account when submitting its bid, and is not a circumstance that could be considered as "unforeseeable" or "beyond the control" of appellant within the meaning of clause 5 (c).

There is, therefore, no need for further consideration by the contracting officer of this ground for an extension.

⁸ The grounds stated in the notice of appeal are chiefly a reiteration and amplification of grounds stated in appellant's letter of August 12, 1955.

⁹ This ground is set out in paragraph 3 of the notice of appeal, but is more fully explained in the August 12 letter.

II

The next ground for an extension is that certain of the dealers named in the specifications had both eastern and western catalogs, which differed in their numbering systems, and that a promise to furnish copies of the catalogs actually used in drawing up the specifications, made by the Regional Engineer "at the inception of the contract," was not fully or timely performed.¹⁰

Delays caused by events of the nature of some of those asserted in this group of allegations would be excusable. If it be the fact that a particular catalog number given in the specifications after the name of a particular dealer was used by that dealer to designate one article in an eastern catalog and another article in a western catalog, or if it be the fact that there was some other ambiguity in the trade references given in the specifications, then delays caused by these defects in the specifications would be excusable, subject, of course, to the provisions of the contract relating to the resolution of ambiguities, such as clause 2 of the General Provisions.¹¹ The allegations to the effect that the problem of the catalog numbers was "at the inception of the contract" taken up with the Regional Engineer, who had been designated by the Regional Director as the engineer in charge of the contract work, would, if true, indicate that relief need not be withheld because of the ambiguities provisions. On the other hand, if the specifications were unambiguous, a failure by the Regional Engineer to carry out a gratuitous promise to provide catalogs would not be an excusable cause of delay, since he had no authority to shift this responsibility from appellant to the Government.

From the inspector's log, which forms part of the appeal file, it appears that as of March 22, 1955, the structure of the residence was largely complete. During the next 2 months little progress was had, work being performed only on a few scattered days. It was not until after May 26, when regular work was resumed, that most, if not all, of the items of material designated by trade references in the specifications, such as plumbing and electrical fixtures and interior cabinets and finishings, were installed. Log entries recording the delivery of these items at the construction site begin on May 18 and recur periodically through July 20, the day preceding the one on which appellant reported the work as complete. These circumstances, if accurately related in the log, pose the question, to which the de-

¹⁰ This ground is set out in paragraphs 4, 5, 10, and 11 of the notice of appeal.

¹¹ The pertinent portions of clause 2 read as follows: "In any case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without this determination shall be at his own risk and expense." Generally similar requirements appear in sections 2 and 16 of the General Conditions.

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cision appealed from gives no answer, whether the loss of time between March 22 and May 26 was due, in whole or in part, to inability of the contractor to make arrangements for obtaining certain of the trade name items because of unresolved ambiguities in the specifications, or, on the contrary, was due to concentration on more profitable jobs, unwillingness to comply with authorized instructions, or some other conduct of appellant that would not be excusable.

This ground for an extension, accordingly, should receive further consideration by the contracting officer.

III

The third ground for an extension is that construction of the concrete block portions of the residence was delayed because of the slowness of the Government in approving, through the issuance of Change Order No. 2, the use of lightweight concrete blocks.¹²

The appeal file indicates that at least as early as January 31, 1955, steps were initiated for a change in specifications that would admit of the residence being constructed of type one lightweight concrete blocks instead of the type 16 blocks specified by the contract.¹³ On February 2, the Director of the Fish and Wildlife Service sent the Regional Director a teletype which stated:

This office agreeable to lightweight block if properly sealed to prevent moisture penetration. If lightweight block less expensive than type specified credit must be taken.

On March 21 the Regional Director issued Change Order No. 2 which, among other things, directed appellant to furnish and install type one concrete blocks in lieu of type 16 blocks. The order expressly stated that no change in the contract price or in the contract performance time would be allowed on account of this substitution. The changes specified in the order and "all conditions relating thereto" were accepted in writing by appellant, under date of March 24, 1955. Why more than 6 weeks elapsed between the date of the Director's teletype and that of the change order is nowhere explained in the record.

Where a contractor, in response to instructions or requests of authorized Government personnel, holds up the progress of the job while consideration is being given to the advisability of making changes in the specifications, the delay so brought about is clearly excusable. In the circumstances of the present case, the Director's teletype would amount to such an instruction or request, irrespective of whether the proposal for the substitution of lightweight blocks

¹² This ground is set out in paragraphs 6, 7, 8, 13, and 14 of the notice of appeal.

¹³ Section 12 of the specifications stated that the concrete blocks should be type 1b, an expression which seems to have been understood by all concerned as a misprint for type 16.

originated with appellant or with the Fish and Wildlife Service, provided, of course, the tenor of the teletype was made known to appellant. The Director having approved the idea of using type one blocks, it would hardly have been reasonable for appellant to have nevertheless gone ahead with type 16 blocks, but neither would it have been prudent for appellant to have used type one blocks until the problems of moisture penetration and expense referred to in the teletype had been definitely resolved. Thus, if appellant did defer ordering concrete blocks, or did defer laying blocks that it had on hand, while awaiting further Government action on the substitution proposal, the delay, if any, so brought about would be excusable.

Allowance of an extension of time commensurate with such a delay would not be precluded by appellant's acceptance of Change Order No. 2. The statement in that order that "No change in contract performance time will be allowed on account of the performance of this work" bars the allowance of any extension of time on account of delays caused by the substitution of type one blocks for type 16 blocks. It would not, however, bar the allowance of an extension of time on account of delays caused by action of the Government in holding up the work while it was considering whether or not to order this substitution.¹⁴ The words "on account of the performance of this work" are not apt to cover delays that preceded performance, and the record contains no indication that the parties understood them as including such delays.

According to the inspector's log, actual laying of the concrete blocks in the walls and gable of the residence was begun on February 21 and completed on March 1. If this be correct, it would be hard to see how any days subsequently lost could be attributed to the problem of the concrete blocks, notwithstanding the failure to issue Change Order No. 2 until March 21. On the other hand, the log also reveals that by February 10 construction had progressed to a point where the blocks could have been laid, and that during the 10 days which intervened between that date and February 21 no work at all was done at the site. If this be correct, it would pose the problem, which the decision appealed from does not answer, whether these 10 days were lost because of delay by the Government in resolving the questions left open by the Director's teletype of February 2, or were lost by reason of some other, and inexcusable, cause.

In view of the matters mentioned above, this ground for an extension should receive further consideration by the contracting officer.

¹⁴ See *J. A. Ross & Co. v. United States*, 126 Ct. Cl. 323, 332 (1953); *J. A. McNeil Company, Inc., ASBCA No. 1156* (May 23, 1952). Cf. *Irwin & Leighton v. United States*, 104 Ct. Cl. 84, 108-110 (1945); *Seeds & Derham v. United States*, 92 Ct. Cl. 97, 108-112 (1940).

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IV

The next ground for an extension is that Change Order No. 4, together with several purchase orders issued by the Government, also caused delay in finishing the job.¹⁵

Change Order No. 4, dated July 18, 1955, made three alterations in the specifications, none of which appear to have involved additions to the work. With respect to two of the alterations, the order stated that no change in the contract price would be allowed, and with respect to the third, it reduced the contract price by \$35. The order also provided, in the same phraseology as did Change Order No. 2, that no change in the contract performance time would be allowed, and it was accepted by appellant on July 20, 1955, in the same terms as was Change Order No. 2. Thus, what has been said, under heading III, with respect to the effect of that order would be equally applicable to Change Order No. 4. Claims for time lost in the performance of the work described in the order would be barred, but not claims for time lost in response to instructions or requests of authorized Government personnel that the work be held up while the matter of issuing a change order was being studied.

The record contains no information as to the wording of the purchase orders mentioned in the notice of appeal, or as to the circumstances in which they were issued. Appellant seems to allege that the carrying out of the purchase orders, or of related Government instructions or requests, necessarily entailed delays in the performance of the work required by the construction contract itself, in that various parts of such work could not be done until the articles covered by pending or approved purchase orders had been obtained and installed, with the result that appellant's work schedules were upset.

The acts of authorized Government personnel in issuing a purchase order or in giving related instructions or requests would constitute "acts of the Government" within the meaning of clause 5 (c) of the General Provisions. Such acts would afford a basis for the allowance of an extension of time if, in fact, they were complied with by appellant and if, in fact, the progress of the contract work as a whole was thereby necessarily slowed down or halted, unless otherwise provided in the orders themselves.

The alleged delays connected with Change Order No. 4 and the purchase orders should, therefore, receive further consideration by the contracting officer.

¹⁵ This ground is set out in paragraph 9 of the notice of appeal, but is more fully explained in the August 12 letter.

V

The fifth alleged ground for an extension is that a strike of teamsters in the eleven western states halted shipments of materials to some of appellant's suppliers, thereby delaying completion of products needed for the residence, and also halted shipments of finished products to the site.¹⁶

Generally speaking, a strike constitutes an excusable cause of delay if it is unforeseeable at the time of the bidding, is beyond the control of the contractor and is without his fault or negligence, and if the completion of the job is actually delayed by the strike or its consequences. Reference has already been made, under heading II, to the entries in the inspector's log that report a protracted period of little or no work at the jobsite, the end of which was substantially coterminous with the beginning of deliveries of fixtures and other manufactured items needed for completion of the residence. These entries present, but do not answer, the question of whether the lateness of such deliveries was due, in whole or in part, to the alleged teamsters' strike or was due to some inexcusable cause, such as a failure by appellant to place timely orders with its suppliers.

This ground for an extension, therefore, should be given consideration by the contracting officer.

The appeal file, accordingly, is remanded to the contracting officer for the making of findings of fact responsive to the causes of delay alleged in the notice of appeal, and for the allowance or disallowance of extensions of time in accordance with the facts as found by him and the applicable legal standards as herein explained. In the event his decision is not acceptable to appellant, the latter may take a further appeal to the Board within the 30 days allowed by clause 6 of the General Provisions.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the decision of the Acting Regional Director is reversed, and the contracting officer is directed to proceed as outlined above.

HERBERT J. SLAUGHTER, *Member*.

I concur:

THEODORE H. HAAS, *Chairman*.

I concur in the result:

WILLIAM SEAGLE, *Member*.

¹⁶ This ground is set out in paragraph 12 of the notice of appeal as well as in the August 12 letter.

STATE OF CALIFORNIA ET AL.**A-27507***Decided December 13, 1957***Public Lands: Classification—Taylor Grazing Act: Classification—State Selections**

Although the Department has recently announced that State selections should generally, as a matter of principle, be honored over competing private applications for the same lands, a decision rejecting a prior State selection in favor of later small tract applications will be affirmed where it is shown that, when the land was classified, the prior State selection was considered along with the applications for small tracts and it was determined that the land was more suitable for small tract disposition than for State selection, and where leases have already been issued on the land selected by the State.

Administrative Practice—Public Lands: Classification—Taylor Grazing Act: Classification

Good administrative practice requires that when land is classified for disposal in a manner which precludes the allowance of applications for the land previously filed those applications be rejected immediately and sufficient time be permitted to elapse to allow the applicants to take appeals from the adverse classification before action is taken by the local office which will result in rights attaching to the classified land under later applications.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

By a decision of April 15, 1957, the Director of the Bureau of Land Management affirmed the rejection by the manager of the land office at Los Angeles, California, of an indemnity selection made by the State of California, pursuant to the act of February 28, 1891 (43 U. S. C., 1952 ed., sec. 851), and section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1952 ed., sec. 315f), of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 32, T. 26 S., R. 33 E., M. D. M., California. The Director held that the rejection by the manager of the selection of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32 must stand because that tract has been classified for small tract purposes and 13 leases, with options to purchase, have been issued pursuant to the provisions of the Small Tract Act of June 1, 1938, as amended (43 U. S. C., 1952 ed., Supp. IV, secs. 682a-e), covering portions of the subdivision.¹ The Director found no reason to cancel the leases which, he noted, are valid contracts, binding on the United States. As to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 32, the Director noted that that subdivision is included in private exchange application Los Angeles 087339 (formerly Sacramento 033549) filed by John E. and Pauline M. McNally on February 11, 1941; that the land was classified for disposal under that application many years prior to the filing of the State's indemnity selection; and

¹ See Appendix A to the Bureau decision for pertinent information relating to Raymond H. Cain and 12 other small tract lessees who are the adverse parties in this appeal.

that issuance of a patent for the land selected under the private exchange application has been held up pending the receipt from the applicants of suitable policies of title insurance and a certificate of inspection and possession covering the offered lands.

The State of California has filed an appeal to the Secretary of the Interior from the Director's decision. The appeal, signed by the State's applicant, Lowell E. Oakes, and transmitted by the State, indicates that it is not the desire of Mr. Oakes to appeal from the rejection of the State's application insofar as it covers the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 32, in conflict with the McNally private exchange application, but that, instead, it is his desire to substitute for that quarter-quarter section the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 18, T. 26 S., R. 33 E. In the circumstances, the matter of this substitution will be referred to the Bureau of Land Management for appropriate action on the new selection and no further consideration will be given to the rejection of the State's selection of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 32.²

With respect to the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32, it is contended that the State's selection was the first application filed for this land, that the State's application is entitled to priority over the applications of private individuals, and that the Department had ample opportunity to act on the State's application prior to the filing of the applications for small tracts.

The State applied for the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32 on December 29, 1953. Before the completion of the examination of the land upon which to base its classification under section 7 of the Taylor Grazing Act, as amended—a necessary prerequisite to the allowance of any application for land withdrawn by Executive Order No. 6910, as was the land involved in this appeal—many small tract applications for this and other portions of sec. 32 had been filed. A field report, made on February 24, 1955, states that, by August 16, 1954, 137 small tract applications had been filed for land in sec. 32. The NW $\frac{1}{4}$ NW $\frac{1}{4}$ was classified for disposal under the Small Tract Act by Classification Order No. 459, which was published in the daily issue of the Federal Register of November 1, 1955 (20 F. R. 8201). Thereafter leases were issued to seven small tract applicants for portions of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ on March 1, 1956, the State's selection of the land was rejected by the manager on April 18, 1956, and leases were issued to six other small tract applicants for other portions of the quarter-quarter section on May 1, 1956.

In *Nelson A. Gerttula*, 64 I. D. 225 (1957), decided after the Director's decision in the present case, it was held that while, as a gen-

² That the appeal is not intended to cover the land in conflict with the McNally application is indicated further by the fact that the State apparently did not serve a copy of the notice of appeal on the McNallys. 43 CFR, 1956 Supp., 221.34. Where a copy of the notice of appeal has not been served on adverse parties, the appeal is subject to summary dismissal. 43 CFR, 1956 Supp., 221.98.

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eral rule, the first application filed for a tract of land is entitled to prior consideration, that rule does not require that the land applied for be classified for disposition under the first application; that the authority vested in the Secretary of the Interior by section 7 of the Taylor Grazing Act, as amended, is discretionary; that in the exercise of that discretion, the Secretary must weigh all factors affecting the public interest; and that it is not incumbent on him, or his delegate, to classify land for disposal under any particular law, even though the land meets the requirements of that law, if the land is found to be more suitable for the uses prescribed or contemplated by other applicable laws, or if the public interest would be better served by disposal under other applicable laws. It was also stated in that decision that applications made by the States in the exercise of their lieu selection rights should, as a matter of principle, be honored over competing private applications for the same lands, even though the latter may more nearly fit the characteristics of the lands and even though the State selection is filed after the competing private applications, so long as it is filed within a reasonable time after such applications.

Although the principle of honoring State lieu selections over competing private applications, later set forth in the *Gerttula* decision, was disregarded in this case, it cannot be said that, as a matter of law, the Director's decision is wrong or that the State's rights have been violated in any way. The State's application, which was admittedly the first application filed for the land, was considered along with the private applications subsequently filed, and it was determined that the land applied for by the State on behalf of Mr. Oakes was more suitable for small tract disposition than for State indemnity selection. Nothing has been presented in this appeal to show that the land is not suitable for small tract purposes or that disposition of the land under the Small Tract Act is otherwise unauthorized. In view of the fact that leases, with options to purchase, have already issued covering most of the quarter-quarter section involved in this appeal, there would appear to be no way at this late date to honor the State's selection. Accordingly, the rejection of the State's application for the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32 is affirmed.

This is not to condone the manner in which this particular State selection was handled by the manager. While there is nothing in the record to support Mr. Oakes' charge that the Department had ample opportunity to act on the State's application prior to the filing of the small tract applications,³ the action taken by the manager

³ Contrary to the statement made in the appeal, the State's application was not the only application of record for this land for approximately one year. The record shows that the first of the applications upon which the small tract leases have been issued were received approximately 5 months after the filing of the State's selection.

after the classification of the land was not in accordance with good administrative practice.

The land was classified for small tract disposition some 5½ months prior to the time the State's application was rejected. At that time leases had already been issued covering portions of the subdivision and, prior to the time allowed to the State to appeal from the rejection of its selection, other leases were issued covering other portions of the subdivision.

Good administrative practice requires that, when land is classified for disposal in a manner which precludes the allowance of applications for the land previously filed, those applications be rejected immediately and sufficient time be permitted to elapse to allow the applicants to take appeals from the adverse classification before action is taken by the local office which will result in rights attaching to the classified land.

In this case, the State should have been given notice that its selection could not be allowed because of the classification of the land for small tract purposes and an opportunity to appeal from the adverse classification before steps were taken by the manager to lease the land. Had this procedure been followed, the State's appeal would have been heard before any small tract leases had been issued and there would not be, as there now is, any bar to the allowance of the State's application in the event the State were unable to convince the Secretary that its prior application should receive favorable consideration. However, as stated above, no error has been shown in the classification of the land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the Director's decision, insofar as it dealt with the NW¼NW¼ sec. 32, T. 26 S., R. 33 E., is affirmed, and the case is remanded to the Bureau of Land Management for whatever action may be appropriate with respect to the substitute selection of the SW¼SE¼ sec. 18, T. 26 S., R. 33 E., for the SW¼SW¼ sec. 32, T. 26 S., R. 33 E.

The file relating to the McNally private exchange is returned in order that the Bureau may take whatever action is appropriate with respect to that proposed exchange. In this connection, it should be noted that after the McNally file was transmitted to this office in connection with the present appeal certain protests against the consummation of the exchange were forwarded to this office. Those protests will require consideration by the Bureau of Land Management.

EDMUND T. FRITZ,
Acting Solicitor.

**PROTEST OF THOMAS WORKS, DELTA-STAR ELECTRIC DIVISION,
H. K. PORTER COMPANY—INVITATION NO. 8527—BONNEVILLE
POWER ADMINISTRATION**

Contracts: Generally—Public Records

Invitations for bids, bids and contractual documents are public records to the extent that they do not involve "trade secret" and "know how" data. Public records are available for inspection in accordance with the procedure set forth in 43 CFR 2.1. Restrictions on the public's right to know how the Department's public business is conducted should be held to a minimum.

M-36487

DECEMBER 24, 1957.

TO THE ADMINISTRATOR, BONNEVILLE POWER ADMINISTRATION.

Congressman Hays, by letter of October 21, 1957, transmitted to this Department a protest by Mr. William C. Carpenter, Sales Manager, Thomas Works, Delta-Star Electric Division, H. K. Porter Company. Mr. Carpenter complains that his company was not allowed to inspect test data submitted by the Electric Transmission Equipment Company under the above referenced invitation.

The Bonneville Power Administration opened Invitation for Bids No. 8527 covering the furnishing of 51,000 suspension insulators on September 26, 1957. Eleven bids were received. The contract was awarded to the lowest bidder, the Electric Transmission Equipment Company of Portland, Oregon.¹ The low bidders unit price is \$2.98 per insulator; all other bidders, among them Thomas Works, submitted unit bid prices of \$3.40 per insulator.

Bidders were required by the Invitation for Bids to submit data under the following seven categories:

1. DRAWING AND DIMENSIONS SHOWING TYPE OF DESIGN.
2. DESCRIPTION OF METHOD OF PORCELAIN MANUFACTURE.
3. STATEMENT OF TESTS MADE ON CEMENT OR CEMENT-SAND MIXTURE USED.
4. DESCRIPTION OF METHOD OF DISTRIBUTING WORKING STRESSES AND ELIMINATING THERMAL STRESSES.
5. NAME AND ADDRESS OF UTILITIES WHO HAVE INSTALLED SIMILARLY DESIGNED INSULATORS, QUANTITIES AND DATE OF PURCHASE.
6. NAME AND LOCATION OF PLANT ALONG WITH DESCRIPTION OF TEST FACILITIES AND PROCEDURES.
7. MAKE AND CATALOG NUMBER AND STANDARD NEMA TEST VALUES.

¹That company proposes to furnish equipment manufactured by the Nypon Gaisha Koischo Ltd., of Nagoya, Japan. However, no "Buy American" problem is involved.

On receipt of a request by the Thomas Works for inspection of test data submitted by the Electric Transmission Equipment Company, the BPA took the position that only "Information shown on the abstract of bids is available to the public and, of course, to any bidder's representative."² BPA refused inspection of other data on the basis (1) that in May of 1955 BPA "established a policy that bidders would not be shown the bid data submitted by their competitors," and (2) that such policy was indicated in the language of paragraph B, page 8 of Invitation No. 8527 which reads as follows:

Information furnished by the bidder as required herein will be used in analyzing bids in an endeavor to predetermine compliances with the specifications and suitability of the insulators for the required service. This information will form no part of the bid, and is not for the benefit of the bidders. * * *

The "policy" referred to above has not been published and generally made available to the public; it is contained only in internal memoranda. However, BPA relies on the above quoted language of paragraph B as making bidders "aware" of the BPA policy.

It would be possible to construe the statement in paragraph B that the information furnished "forms no part of the bid, and is not for the benefit of the bidders" as implying that such information would not be available for inspection.³ I think, however, that such an interpretation would not be warranted, since I believe that the paragraph would ordinarily be regarded as dealing with the procedures with respect to bids and the analysis of them. Furthermore, it seems to me that such a restrictive interpretation of paragraph B would not be consistent with the Department's policy respecting the status of invitations, bids, and contracts.

The departmental policy has been stated in a memorandum, dated April 11, 1957, from the Solicitor to the Secretary on the subject "Status of hearings and records respecting contract appeals." This memorandum, which was approved by the Acting Secretary of the Interior, states that:

It seems clear to me that the invitations, the bids, and the contractual documents are public records.

² According to a statement made by BPA this "abstract shows the name and address of the bidders, the acceptance time for the bid and discount, if any, the bid prices per unit and total for each item, the guaranteed maximum shipping weights, whether or not the bids are based on zone prices, the delivery offered by the bidders, the point of production of the material bid upon and the name and address of the supplier and the points from which shipments and inspections are to be made. In addition there is shown the bidders response to the two questions; (1) does the bid comply with terms and conditions and (2), does the bid comply with the specifications. In this case every bidder answered yes to both questions."

³ The expression "not for the benefit of the bidders" can be traced to *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1939), where the Supreme Court of the United States stated on page 126:

"Section 3709 * * * was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. * * * The duty is imposed upon the officers of the Government and not upon him [private person]. That duty is owing to the Government and to no one else."

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As information of the type under consideration here is submitted in aid of the analysis of the bids, I believe that the rule followed by the Department in connection with bids should generally be applied to the supplementary information.

I recognize that there may be exceptional circumstances in which this rule should not be applied to supplementary information,⁴ but so far as I am aware, this case does not present such an instance.

In my opinion the policy advocated by the BPA is too narrow, because under such policy even ordinary information could be refused if a private contractor should desire BPA to withhold such information. It is not consistent with the principle that restrictions on the public's right to know how the public business is conducted should be held to a minimum.

Invitation No. 8527 specifies the manufacture of insulators in accordance with NEMA standards. The BPA Chief of Supply in teletype P-397 states that such insulators "definitely are catalog items."⁵ Consequently, unless something in the data furnished constitutes data concerning trade secret or know-how, information furnished by bidders in connection therewith must be considered as ordinary information which should be made available upon request. In this connection, it is noted that the Electric Transmission Equipment Company has not qualified any of the data furnished in reply to Invitation No. 8527 as information which could not be disclosed to competitors.

Unless there is something in the data submitted that would serve to raise a question on the part of BPA with respect to possible trade secret or know-how status, it is my determination, pursuant to the authority conferred in me by 43 CFR 2.2 (b), that these data should be made available for inspection by Thomas Works. If, on the other hand, some items appear to be questionable, BPA should proceed to resolve their status while releasing the unaffected balance of the data at this time.

ELMER F. BENNETT,

Solicitor.

⁴ Information used by industry can be divided into three distinct categories: "ordinary" information; information contained in patents; and information embodied in such categories as trade secrets and know-how and generally termed "technical information." "Ordinary information, of course, is to be found in the common experience of the technicians of an industry, in textbooks, or in expired patents and is indisputably a part of the public knowledge. No problems of ownership can arise, because no private rights may be asserted." *Whale, "Government Rights To Technical Information Received Under Contract,"* 25 Geo. Wash. L. Rev. 289 at 291 (January 1957). Cf. *Forman, "Proprietary Rights in Research and Development Contracts,"* 17 Fed. Bar J. 298 (July-September 1957).

⁵ BPA also states that they know "no manufacturer who carries large quantities in stock, therefore insulators are usually manufactured for our orders." The BPA, however, advises that such insulators do not represent newly developed equipment.

APPEAL OF J. A. TERTELING & SONS, INC.**IBCA-27***Decided December 31, 1957***Contracts: Changed Conditions—Contracts: Additional Compensation—
Contracts: Specifications—Contracts: Drawings**

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.

**Contracts: Changed Conditions—Contracts: Additional Compensation—Con-
tracts: Specifications—Contracts: Drawings**

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual pre-bid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation.

**Contracts: Drawings—Contracts: Damages: Unliquidated Damages—Con-
tracts: Contracting Officer—Contracts: Appeals**

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.

Contracts: Specifications—Contracts: Performance

A claim for additional compensation made by a tunneling contractor on the ground that it was compelled to excavate 2 inches below the spring lines of

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the tunnels throughout their lengths in order to provide space for installing steel lagging outside the steel ribs must be rejected when the contractor was paid, in accordance with the provisions of the specifications, for such additional excavation in the reaches of the tunnels as was necessary to permit the installation of steel lagging, and the installation of steel lagging was wholly unnecessary in other long reaches of the tunnels.

Contracts: Specifications—Contracts: Changes and Extras

A claim made by a tunneling contractor for remission of an overbreak charge because a certain yardage of the overexcavation was utilized in enlarging areas of the tunnels that intersected with a tunnel constructed under another contract must be rejected, since whatever change was involved was made under another contract, and did not in any way affect the quantity or characteristics of the work called for under the contract under which the claimant contractor operated, and the overbreak charge was made strictly in accordance with the terms of that contract.

Contracts: Damages: Liquidated Damages—Contracts: Delays of Government—Contracts: Delays of Contractor—Contracts: Unforeseeable Causes

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor.

BOARD OF CONTRACT APPEALS

This is a timely appeal by J. A. Terteling & Sons, Inc., of Boise, Idaho, from findings of fact and decisions of the contracting officer dated December 22 and December 23, 1954, denying the request of the appellant for additional extensions of time, and compensation in connection with the performance of Contract No. I2r-19685 with the Bureau of Reclamation, hereinafter referred to as the Bureau.

The contract, which was dated December 7, 1951, and which was executed on U. S. Standard Form No. 23 (Revised April 3, 1942), provided for the construction and completion of open cut and tunnel excavations for the power and outlet tunnels for the Palisades Dam, Palisades Project, Idaho.¹

Under the terms of the specifications, the tunnels were to be completed within 230 days of the receipt of notice to proceed, and for

¹ The contract also provided for the completion of a small substation but this is in no way involved in the present appeal.

each calendar day's delay in completion, the contractor was to pay the Government \$300 a day in liquidated damages.² Notice to proceed was issued on December 14, 1951, and it was received by the contractor on December 17, 1951. This would have required completion of the tunnels by August 3, 1952. However, by reason of various delays, extensions of time for performance totaling 113 days were granted,³ and the required completion date thus became November 25, 1952. The work under the contract was completed and accepted as of March 16, 1953. This was a delay of 112 calendar days beyond the extended completion date, and liquidated damages in the amount of \$33,600 were assessed against the appellant. In its release on contract dated July 8, 1954, the appellant excepted the following claims:

(1) Claim for increased quantities (of excavation) reserved in the amount of \$8,000.00; (2) Claim for remission of overbreak based upon changed conditions and/or misrepresentation reserved in the amount of \$116,000; (3) Additional cost of excavation, timbering, etc. based upon changed conditions and/or misrepresentation reserved in the amount of \$87,000.00; and (4) Claim for remission of liquidated damages reserved in the amount of \$33,600.

These claims, which total \$244,600, were more particularly described in a letter dated July 8, 1954, that accompanied the appellant's acceptance of the Government's final payment voucher.

The Palisades Dam site is on the south fork of the Snake River in southeastern Idaho, and is located at a narrow constriction of the river valley where the course of the river had been abruptly altered by a large mass of igneous rock. The Palisades project is a multiple-purpose project, involving irrigation, power production and flood control. The Palisades Dam, and appurtenant works, including a spillway tunnel, were to be constructed under another contract let subsequent to the contract in issue in this proceeding, but the spillway tunnel was actually constructed by the appellant in this proceeding under a subcontract with the Palisades Dam contractor.

The contract for the power and outlet tunnels, which were constructed through the left abutment of the Palisades Dam, was let before the Palisades Dam contract, since these tunnels were part of a plan to make use of them to divert the river during the period of construction of the Palisades Dam. Although the inverts of the power and outlet tunnels were entirely below the grade of the river, the plans for the Palisades project contemplated the construction under the Palisades Dam contract of inclined tunnels near the upstream ends of the power and outlet tunnels in order to make possible the release of water from the Palisades Reservoir through inlet structures at a higher elevation than the tunnel and river levels. The in-

² In accordance with paragraphs 20 and 21 of the specifications.

³ By findings of fact dated October 28, 1952, and May 8, 1953.

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clined portions of the upstream ends of the power and outlet tunnels were also constructed by the appellant as a subcontractor for the Palisades Dam contractor. After completion of the power and outlet tunnels, they were lined with concrete by the Palisades Dam contractor.

The power and outlet tunnels run parallel to each other, approximately 110 feet apart, measuring between the center lines of the tunnels. The power tunnel, which is 1,212.5 feet in length and is closer to the river than the outlet tunnel to the west thereof, begins at the upstream portal at Station 1+97.5 and ends at Station 14+10, while the outlet tunnel, which lies farther in the abutment, is 1,579.5 feet in length, and runs from Station 1+97.5 to Station 17+44. The top of each of the tunnels was at an elevation of approximately 5,400.

On May 13, 1956, the undersigned, a member of the Board, accompanied by representatives of the appellant and the Government, viewed the site of the Palisades Dam and the tunnels. However, it should be emphasized that the tunnels had long before the date of the view been lined with concrete and that the face of the rock near the portals that was viewed by members of the party was not the same face that had been visible to prospective bidders.

A hearing for the purpose of taking testimony with reference to the appellant's claims was held at Idaho Falls, Idaho, from May 14 to 17, 1956, inclusive, before the undersigned. The principal witnesses for the appellant were Glen O. Dolan, assistant to its General Manager; William C. Foss, its General Manager and Vice President; and Eugene C. Williams, its General Superintendent on the job. In addition, Matt S. Walton, Jr., an assistant professor of geology at Yale University, testified as an expert witness on behalf of the appellant. The principal witnesses on behalf of the Government were Lewis B. Ackerman, the Construction Engineer at the Palisades project; Grant Bloodgood, the Associate Chief Engineer of the Bureau of Reclamation; Donald S. Walter, Regional Engineer of Region 1 of the Bureau of Reclamation; and Henry P. O'Donnell, the Field Engineer at the Palisades project.

There are various provisions of the contract documents that are particularly relevant to the consideration of the claims, in addition to those already mentioned.

Item 3 of the bid schedule called for "Excavation, all classes, in tunnels" in the amount of 83,000 cubic yards at a price of \$10.05 per cubic yard. Item 4 of the bid schedule, as amended by Supplemental Notice No. 1, dated November 19, 1951, called for "Furnishing and placing permanent structural-steel tunnel supports, steel tunnel liner

plates, and steel lagging" in the amount of 2,000,000 pounds at a price of 0.157 cents per pound.

Paragraph 37 of the specifications, headed "Records of subsurface investigations," and included in the section of the specifications headed "Local Conditions," provided:

The drawings included in these specifications show the available records of subsurface investigations for the work covered by these specifications. The Government does not represent that the available records show completely the existing conditions and does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions. Bidders and the contractor must assume all responsibility for deductions and conclusions which may be made as to the nature of the materials to be excavated, the difficulties of making and maintaining the required excavations, and of doing other work affected by the geology at the site of the work.

Paragraphs 51, 52, and 53 of the specifications provided for the excavation of the tunnels, for the installation of permanent and temporary supports where required, as determined by the contracting officer, and for the modes of payment for these operations. The first subparagraph of paragraph 51 provided that item 3 of the bid schedule was to include "all required excavation performed by tunneling methods for the outlet and power tunnels;" that all excavation for the tunnels was to be performed from the upstream portals of the tunnels to the lines, grades and dimensions shown on the drawings or as directed by the contracting officer; and included the statement that it was expected that permanent supports would be required in portions of the tunnels. The second subparagraph of the same paragraph included the following provisions:

The "A" lines shown on the typical sections on the drawings are lines within which no unexcavated material of any kind, and no supports for sides, roof, or other parts of the tunnels shall be permitted to remain. The "B" lines shown on the typical sections are the outside limits to which payment for excavation will be made, and payment will, in all cases be made to these lines regardless of whether the limits of the actual excavation fall inside or outside of them. In unsupported sections, and across the bottoms of supported sections, the "B" line will be located as shown on the drawings. In the sides and arch of supported sections the "B" line shall be 4 inches outside of the outside face of the steel supports above the horizontal center line of the tunnel⁴ and along perimeter of the steel supports below the horizontal center line to the bottom of the steel supports: *Provided*, that where liner plates only are used for supports, the "B" line shall be 6 inches outside of the "A" line as shown on the drawings. * * * The contractor shall use every precaution to avoid loosening material beyond the "B" line. All drilling and blasting shall be performed carefully so that the material outside of the required lines will not be shattered * * *.

⁴ This is commonly referred to as the "spring line."

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Finally, the third subparagraph of paragraph 51 contained the following provisions:

Measurement of tunnel excavation for payment will be limited to specified sectional dimensions and will be made along the located center lines of the tunnels only for such reaches of the tunnels as are excavated by tunneling methods. No additional allowance above the unit price per cubic yard bid in the schedule for excavation, all classes, in tunnels will be made on account of the nature or condition of any of the material encountered or on account of any of the material being wet or frozen. Upon completion of the contract, the contracting officer will compute the total volume of material actually excavated from each tunnel based on measurement in excavation, and, if the total volume actually excavated from each tunnel exceeds the total volume within the "B" line for the tunnel, a deduction of twenty dollars (\$20) per cubic yard for each cubic yard of such excess excavation will be made from the final payment due the contractor under the contract.

This provision for a deduction for overbreak, which allowed the contractor a tolerance for excess excavation between the "A" and the "B" lines but required the contractor to compensate the Government for any further overexcavation, was extremely important to the Government, since in lining the tunnel the overbreak, as well as the space between the "A" and "B" lines, would have to be filled with concrete at the cost of the Government, which figured that cost for the purposes of the specifications at \$20 a cubic yard. Actually, the record shows that the cost to the Government turned out to be approximately \$29 a cubic yard (Tr., p. 472).

Paragraph 52 of the specifications, which provided for the installation of permanent tunnel supports, stipulated that suitable permanent structural-steel ribs including steel lagging or liner plates were to be used to support the roofs and sides of the tunnels "where required as determined by the contracting officer." Permanent supports for the normal tunnel sections were to consist of "structural-steel ribs, with or without steel lagging or liner plates; steel tunnel-liner plates without structural steel ribs; structural steel ribs with or without steel lagging or liner plates and with radial timber struts; or tunnel roof support bolts * * * ." The steel supports might be supplemented by permanent radial timber struts as shown on the drawings or as directed. If used, it was further provided that all timber for such struts was to be "well-seasoned sound timber, 8- by 8-inch maximum in cross section" and that at no place was the distance between the center lines of two adjacent struts to be less than 3 feet. The distance between structural steel rib supports was to be as directed or approved by the contracting officer. If required, temporary timber spreaders were to be furnished and installed by the contractor and were to be left in place upon completion of the contract. "In sections of the tunnels sup-

ported by structural steel ribs with liner plates or continuous metal lagging," it was further provided, "the contractor shall fill all spaces outside of the steel lagging or steel liner plates, as completely and compactly as possible, with clean rock spalls of quality satisfactory to the contracting officer." No direct payment was provided for furnishing or installing temporary timber spreaders, permanent timber struts, or rock-spall materials. Paragraph 52 of the specifications also declared: "The amount of permanent supports that will be required is uncertain, and the contractor shall be entitled to no additional allowance above the unit prices bid in the schedule by reason of any amount of or no permanent tunnel supports being required."

Paragraph 53 of the specifications, headed "Temporary timbering in tunnels," provided as follows:

Temporary timbering, except for temporary timber spreaders, includes all timbering in tunnels which is not shown on the drawings or provided for in Paragraph 52. Suitable temporary timbering may be used where necessary to support the roof and sides of the tunnels during erection of permanent supports: *Provided*, That such timbering shall be removed by the contractor before the completion of this contract. Material for temporary timbering, if required, shall be furnished by the contractor. Nothing contained in this paragraph shall prevent the contractor from erecting such amounts of temporary timbering as he may consider necessary * * * .

Articles 4 and 9 of the contract were the standard "changed conditions" and "delays-damages" articles in use at the time the contract was made. Article 4 provided:

Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 9 of the contract provided that the contractor should not be charged with liquidated damages "because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor," including, but not restricted to certain named causes, among which was "unusually severe weather."

It is apparent that because of the relationship between the Terteling contract and the Palisades Dam contract that time was of the essence in the completion of the tunnels. The contracting officer regarded the

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tunnel excavation as "the key factor in determining the progress of the entire Palisades Project." In his testimony, Bloodgood characterized the Terteling contract as "a highball job" (Tr., p. 581).

With a letter dated January 7, 1952, the appellant submitted a proposed construction program to the Bureau which called for completion of the tunnel excavation within 146 calendar days, and which would have meant, therefore, an average excavation of 22 feet per working day. As the appellant planned to start excavation on February 10, 1952, the scheduled rate of progress would have made it easy to meet the contract completion date of August 3, 1952. The construction engineer on the project was skeptical, however, concerning the appellant's expectations. In a letter dated January 11, 1952, he commented on the construction program, as follows: "Considering the large size of the bores and *the nature of the rock* in which the tunnels are to be driven the average approximate rate of 22 feet of completed tunnel a day, indicated by your program, appears optimistic" [italics supplied]. The appellant made no reply to this letter.

The appellant's executives testified that they planned to drive from a full face heading, and shooting 15-foot rounds in a two-shift operation, accomplish 30 feet of tunnel excavation per day, once the portaling-in operation was over.⁵ The reasonableness of this expectation, if indeed it was actually harbored, is negated by such circumstances as the fact that appellant made use of a single jumbo for both drilling and setting steel; that even Dolan finally conceded that it would be unrealistic to expect to shoot 15-foot rounds in a tunnel requiring full supports (Tr., p. 220); and that such drilling would tend to result in excessive overbreak. It is also highly significant that the first time that the 30 feet per day figure was made known to the Government was at the hearing in this case.

Unfortunately, among the delays encountered at the beginning of the performance period of the contract was difficulty in the procurement of steel, due to strikes and the operation of the national priorities system, and as long as steel supports were not available, actual tunnel excavation could not proceed. The contractor performed the open cut excavation at the upstream portals in April 1952. The excavation of the tunnels did not actually begin, however, until June 16, 1952, or 3 days after the arrival of steel, notwithstanding the fact that the appellant had had at least a week's advance notice of the arrival of the steel (Tr., p. 244). Portaling-in was slow, but such an operation is usually slow and difficult. At the beginning there was some fall-out from the roofs of the tunnels and some trouble was

⁵ Dolan testified that there was a rule of thumb in the tunneling industry that the depth of shots could be expected to be one-half the diameter of the tunnel (Tr., p. 81).

experienced as a result of water seeping through the coffer dam. But the rock improved as the headings were advanced. Nevertheless, progress continued to be slow, due to equipment and organizational difficulties encountered by the appellant.⁶

A conference was arranged and was held on August 7, 1952, to discuss the difficulties. Among the Bureau representatives who attended the meeting were the contracting officer, L. N. McClellan, and Bloodgood and, in addition to Dolan, Foss and Williams, of the appellant's organization, N. L. Terteling was present. At the time of the conference between 100 and 150 feet of the tunnels had been excavated, and a part of the tunnels had been supported with continuous lagging, a method of supporting that the appellant abandoned when it was called to its attention that the specifications provided that when continuous lagging was used, it had to be backpacked with rock spalls.⁷ In addition to a discussion of the appellant's equipment and organizational difficulties at the August 7 meeting, the Bureau personnel complained that the appellant was resorting to excessive cribbing, which the appellant preferred to timber struts or to backpacking with spalls, both of which methods were slower and more expensive, although this is not to imply that timber struts would be a practical means of supporting the rock under all circumstances. As, under the terms of paragraph 53, the cribbing was a form of temporary timber support, it would eventually have to be removed.

There was considerable discussion at the meeting of the use of timber struts versus cribbing. Dolan testified that the only promise that was made on the appellant's side at the meeting of August 7 was that it would do its level best to minimize the use of cribbing (Tr., p. 126). Bloodgood testified, however, that Terteling told him that the appellant would take the timber out after the fears of the workmen had quieted, and it had got the job going. In view of a letter which Ackerman wrote much later to the appellant under date of October 25, 1952, to which the appellant made no reply, and in view of the importance of making a reply under the circumstances, the Board must find that the appellant did promise to remove the temporary timbering. After referring to various discussions of the problem, including the discussion at the meeting of August 7, Ackerman stated:

At various times during these discussions, including the one participated in by Mr. McClellan and Mr. Bloodgood, you have indicated that permanent strutting would be used, except that temporary timbering would be placed adjacent

⁶ The question whether the appellant was at fault in not overcoming these difficulties sooner than it did is discussed below in connection with the claim for an extension of time for performance.

⁷ The permanent steel supports actually installed in the tunnels consisted of 10-inch "I"-beams weighing 25.4 pounds per lineal foot, supplemented by the steel lagging. The beams were bent to the circumference of the circles over the arch sections of the tunnels, while their legs sat on foot blocks.

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to the heading as considered necessary by you for the safety of the workmen during excavation operations. You indicated that you would follow up the excavation operations with checking and tightening of the permanent timber struts previously installed and removal of the temporary timbering, and installation of additional permanent timber struts.

Up until the present time, the installation of permanent struts has been intermittent and without any apparent planning or system. Considerable cribbing has been placed and no attempt has been made to remove it.

The parties are also in dispute as to whether the problem of excessive overbreak was brought up by the appellant's representatives at the August 7 meeting. Counsel for the appellant asked Dolan during his direct examination: "And at that time were you raising the question of an *extensive* amount of overbreak being encountered because of the nature of the rock that was being excavated?" [*italics supplied*], but Dolan merely replied: "Well I think we did mention the fact that there was a heck of a lot of overbreak, but whether it was any more than a mere mention I don't recall." (Tr., p. 126-27.) On redirect examination, Dolan testified that, while he did not recall that he himself complained of overbreak, the "whole condition was discussed," and that "Everybody had knowledge of the bad overbreak conditions" (Tr., p. 314). Bloodgood testified that there was no mention at the meeting of having encountered rock that was unusual or unanticipated (Tr., p. 596). Walter testified on cross-examination that it was "true" that at that particular time the appellant was complaining "about the amount of overbreak he was getting" but on redirect examination he testified that the contractor did not "indicate in any way that this was an unanticipated condition" (Tr., p. 723). Being convinced that the appellant had not encountered any serious unanticipated overbreak problem up to this time, the Board is impelled to resolve the conflicting testimony by finding that, while the subject of overbreak was mentioned at the meeting—indeed overbreak is such an omnipresent problem in a tunneling contractor's mind that he would be apt to mention it in any discussion of a tunneling operation, especially if he were shooting loose⁸—there was no assertion of any excessive overbreak, or of filing a claim based on such a condition.

The progress of the appellant began to improve after the August 7 meeting, and good progress was being made by its forces by the week of August 23. However, trouble was encountered by the end of the month. The name of the great mass of columnar jointed andesite about 500 feet thick, intruded as a sill into a series of clay, silt and conglomerate beds, through which the tunnels were being

⁸It is significant that as early as July 1952 Ackerman had mentioned to his own inspectors that he thought the contractor was shooting too loose, and hence getting too much overbreak.

driven, was Calamity Peak, and from the appellant's point of view, at least, it began to justify its name. Weathered zones, which the appellant's witnesses uniformly referred to in their testimony as the "bad ground" areas, were encountered from Stations 5+80 to 7+20 in the power tunnel—a distance of 140 feet—and from Stations 5+42 to 7+12 in the outlet tunnel—a distance of 170 feet—or for a total distance of 310 feet out of a total 2,792 feet of tunnel excavation, which would be approximately 11 percent of the tunnel excavation.

While the appellant's and the Government's witnesses differed in nomenclature and emphasis in describing the conditions in the weathered zones, their testimony is, with some minor exceptions, in close agreement. While the condition of the ground was not uniform, clay or mud seams and broken rock were encountered. Dolan was rather vague as to the precise number of the clay seams, but O'Donnell, who was in the tunnels practically every day, testified that there were three weathered areas in the power tunnel, and four in the outlet tunnel, the largest being about 2 feet wide (Tr., p. 767). There were some rock falls from the arch, creating "chimneys." Dolan testified that there was one 16 feet high, but O'Donnell testified that his inspectors reported a few from 9 to 12 feet high, and that there was one place in the power tunnel where material in excess of 50 cubic yards dropped from the roof (Tr., p. 771-72). On the other hand, no considerable amount of water was encountered, and, considering that the tunnels were below river level, this was providential. Unlike Dolan, O'Donnell did not observe any mud seams oozing from the crevices (Tr., p. 792).

So far as tunneling methods are concerned, however, while the rounds had to be reduced,⁹ and there was some resort to the use of crown bars and to plugging at the heading, there was no great departure from normal tunneling methods. Cribbing had to be used to a considerable extent, particularly in the arches of the tunnel, but the appellant did not have to install closely spaced lagging back-packed with tunnel spalls, which is a technique employed when exceptionally bad ground is encountered, nor did it have to make use of breast boards or liner plates. In only one instance was it necessary to set the steel supports at closer than four-foot centers (Tr., p. 787). While progress was retarded in the weathered zones, work never stopped; no shift was ever shut down, nor did the appellant fail to shoot at least one round every shift on every day (Tr., p. 468).

However, overbreak was more extensive in the weathered zones than elsewhere in the tunnels. The amount of overbreak throughout

⁹ Ackerman testified that through particularly bad areas the rounds had to be reduced to 4 feet, but that nevertheless some 8-foot rounds were shot, and even Dolan conceded that one 12-foot round was shot. In only one place was it necessary to use a shovel without shooting.

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the power and outlet tunnels as a whole was 10,015.2 cubic yards, and the percentage of overbreak was 11.6 percent. The amount of overbreak in the weathered zones of the two tunnels was 1,268.1 cubic yards, and the percentage of overbreak was 13.3.

The excavation of the weathered zones of the tunnels occupied the month of September 1952. Once the appellant's forces emerged from the weathered zones progress was quite rapid. Excavation proceeded at a pace that was roughly twice as fast as previously, and comparatively little cribbing had to be installed downstream from the weathered zones. Indeed, Ackerman, in the middle of October, even raised the question with Dolan and Williams whether the steel ribs in the tunnels could be left out altogether. The rock then looked good to Ackerman and 95 percent of it did not seem to him to require the steel supports (Tr., pp. 457-58, 473). O'Donnell was pretty much of the same opinion. While he would not say that 95 percent of the steel supports were unnecessary, he thought "a very high percentage was not required." Dolan, also, who thought that they were getting into "a little better ground" than we ever had before, reacted rather favorably to Ackerman's proposal but he deferred to Williams who "after all, was the tunnel man." (Tr., p. 218-19.) Williams asked whether the Government would pay for the steel which the contractor then had on the job but was told that such payment would not be possible under the terms of the specifications. He then also asked whether the Government was ordering them to leave out the steel and was told that such was not the case (Tr., p. 774). There the matter rested. While it may seem strange that the appellant should be installing a great deal of steel that apparently served no useful purpose, it must not be forgotten that in tunnel construction more steel may be used than is strictly necessary in order to quiet the fears of the miners, and that this to a contractor may be as valid a purpose as actually supporting the rock. Moreover, a contractor who was behind in its work schedule would be particularly likely to take such a factor into consideration, especially since the Government paid only for such steel as was used, and unused steel simply would become surplus.

The power tunnel was finally holed through on December 1, 1952, and the outlet tunnel on January 6, 1953. This did not complete, however, the work on the tunnels, for the inverts of the tunnels, which represented the portions of the tunnels below the footblock line and which constituted approximately 15 percent of the tunnel areas, still had to be removed. The decision to postpone the removal of the inverts was made by the appellant as early as August 14, 1952. Dolan explained this decision as an effort to expedite the work

when the contractor discovered that the condition of the rock under the footblock berms was such that it would be difficult during the shooting process to hold the steel on the footblocks (Tr., p. 117). But Williams, who was the appellant's tunnel man with decades of experience, testified that the appellant would, perhaps, have made the same footage even if the invert work had not been deferred! When Dolan's inconsistent testimony was called to his attention, he grudgingly seemed to concede that there was a problem of holding the berm grades for the footblocks but added that "another reason" for deferring the invert work was that "we would have a better working way for our equipment" (Tr., p. 419-20). This would have nothing to do, of course, with the condition of the rock. The invert work in the power tunnel extended from November 30, 1952, to February 20, 1953, and in the outlet tunnel from January 9, 1953, to March 16, 1953.

After the tunnels had been holed through, the Bureau had a difficult decision to make. In the weathered zones cribbing had been used extensively, and to some extent cribbing also remained in the areas downstream from the weathered zones. Since under the terms of the specifications cribbing was temporary timber, and the contractor was, therefore, required to remove it, this would have meant additional delay. On the other hand, the presence of continuous timber¹⁰ along which water might percolate and which might fracture the lining of the tunnels was undesirable, particularly in pressure tunnels. The Bureau finally decided in January 1953 that additional delay should be avoided at all costs, and that the cribbing should be allowed to remain in the tunnels, especially since the concrete contractor would be able to get in between the cribbing to place concrete to support the rock. As Bloodgood put it, this wholly unprecedented decision was made because "we wanted to get Terteling out of there" (Tr., p. 602).

The appellant's major claim is that it encountered "changed conditions" within the meaning of article 4 of the contract in excavating the tunnels. Whether the appellant is entitled to have the deduction for overbreak remitted, and its additional costs of excavation and timbering allowed, depend obviously on the answer to the question whether it encountered changed conditions. Even the claim for an extension of time, and the cancellation of the assessment of liquidated damages, depends for the most part on the allowance of the changed conditions claim. However, the claim presents certain problems of scope, notice and timeliness before its merits may be considered.

Except possibly for some oral conversation that Dolan had with Ackerman on the subject of changed conditions, the first notice to

¹⁰ Cribbing was likely to be much more damaging than timber struts that are placed radially several feet apart.

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the Bureau that any such a claim was being asserted was contained in a letter dated September 23, 1952, from the appellant to Ackerman. While the language of this letter was general in its terms,¹¹ it was written when the appellant's forces were about three quarters of the way through the weathered zones, and could have referred only to conditions of the same nature as those encountered up to that time. In acknowledging this letter under date of October 3, 1952, Ackerman stated that the appellant's letter would be considered "timely notification."

In November 1952 the appellant retained a consulting geologist by the name of Harold T. Stearns to examine the rock conditions in the tunnels and to render a report. Accompanied by Dolan, Stearns examined the tunnels, and filed a report under date of November 11, 1952. The appellant transmitted this report to Ackerman with a letter dated January 26, 1953, in which it gave details of its claims by reason of having encountered "badly shattered ground" in the two tunnels *in the month of September 1952*. "This material," it explained, "contained mud and sand seams, sloughed and caved badly, required over-excavation and timbering, and in general slowed down our progress appreciably." The appellant now specifically identified these "bad ground" areas as having been encountered "between Stations 5+80 and 7+20 of the power tunnel, and between Stations 5+42 and 7+12 of the Outlet tunnel." The appellant asked in this letter for additional compensation in the amount of \$64,169.66, for an extension of time of 12 days, and for exemption from the overbreak charges in the "bad ground" areas of the tunnels. At the time the letter was written invert excavation had been commenced, although it had not yet been completed (Tr., p. 286). Foss conceded that at the time this letter was written that the appellant knew everything about the physical condition of the rock in the tunnels (Tr., p. 371). He also conceded that the Stearns report covered only the weathered zones of the tunnels (Tr., p. 367).

In a letter dated April 10, 1953, Ackerman rejected the claim asserted in the appellant's letter of January 26, 1953. In his letter, he identified the claim as "based on certain areas of 'bad ground' which you encountered in excavation of the outlet and power tunnels." On May 6, 1953, however, when Dolan and Foss were in the project office talking to Ackerman, they asked for the overbreak figures, and when they obtained them, they stated that the figures were unacceptable, and that they would file claims based on conditions encountered *throughout the two tunnels*. Such a claim they asserted for the first

¹¹ "In the excavation of the two tunnels covered in the above referenced contract," the appellant stated "we have encountered materials which are different from, and more costly to excavate than, the materials indicated in the plans and specifications furnished to us at the time of preparing our bid."

time in writing in a letter to Ackerman dated December 16, 1953, which was, of course, long after the tunnels had been holed through.

However, even in this letter, the appellant still did not specify the nature of the conditions that had been encountered in the tunnels downstream from the weathered zones. Notice of these conditions was first given to the Bureau in the letter dated July 8, 1954, from the appellant to Ackerman¹² with which it transmitted a geological report from Dr. Walton, and in which it referred also to a geological report on the Palisades Dam site made for the Bureau by H. K. Dupree in 1947, which, it stated, had recently come to its attention. Dr. Walton had been retained as a consultant by the appellant, and on March 27, 28, and 29, 1954, he had visited the Palisades Dam site and the tunnels to study the geological conditions there. At this time the tunnels were being lined with concrete but several hundred feet at the upstream ends of the tunnels were still exposed. Dr. Walton testified that he inspected and logged all the drill cores relevant to the tunnels, perused the Dupree report for several hours in the project office, prepared microscopic thin sections of 18 specimens of rock which he had taken from the site, and made a petrographic examination of the specimens. He also testified that he inspected the rock in the spillway tunnels. However, Dr. Walton took no pictures of the rock conditions in the tunnels, and did not call the attention of any of the Bureau personnel to the phenomena which he was observing. These phenomena were variously described at the hearing as "slate-like cleavage," "platy fracturing" and "latent sheeting," all of which designated an alleged physical tendency of the rock to break into thin sheets. Dr. Walton attributed his failure to take photographs of this condition to the fact that he was not a professional photographer and to his erroneous belief that there were complete sets of photographs already in existence, and he ascribed his failure to call the attention of Bureau personnel to the condition which he had observed to the fact that it was abundantly displayed in the rock that was exposed all around the tunnel site.

On the basis of Dr. Walton's report, the appellant now asserted, in its letter of July 8, 1954, another claim of having encountered a changed condition, "separately and independently" of the claim based on the conditions in the weathered zones, namely "a condition of latent sheet fracturing," downstream from the weathered zones, which, according to the appellant, accounted "not only for the manner in which the rock broke during blasting but also explains in large measure the cause for excessive overbreak." In the alternative, it also advanced a claim based on misrepresentation of conditions. In sup-

¹² This is the same letter that accompanied the appellant's acceptance of the Government's final payment voucher.

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port of this claim, the appellant asserted that "None of the latent sheet jointing which was present in this rock was reported by the contract borings."

On the basis of the evidence the Board must find that the contractor did not encounter unusual difficulties in excavating downstream from the weathered zones, and that the condition of latent sheeting did not prove to be a practical problem in the excavation of the tunnels of which account need be taken. The fact that a geological condition may exist does not necessarily establish that it causes difficulties in excavation. Dolan and Foss, as well as Williams, reflected in their testimony Dr. Walton's scientific explanation of a condition of which they had only the vaguest notion, and made claims that were only afterthoughts based on his revelations. Asked to what extent the material broke in thin slices, Dolan replied: "Well all I can say is that it prevailed at a considerable extent. In other words, it wasn't hard in any location to find material that was breaking in thin slices. Percentage-wise it would just be a wild guess. I wouldn't know" (Tr., p. 219). When Foss was asked when he first became aware of the phenomenon of latent sheet jointing, he replied: "I believe it came from Mr. Walton's report" (Tr., p. 376). With equal frankness, he admitted that he had not made any estimate of the amount of over-break which was attributable to the latent sheet jointing. As for Williams, when he was asked whether the rock had come off in sheets, he replied: "Well, yes, to a certain extent but there was a good lot of that that was pretty *blocky* and came off in *chunks*" (Tr., p. 421, italics supplied). Another question put to Williams and his answer are even more significant. Thus:

Q. You have stated that the rock broke along some mica-like lines. Could you state how the rock would have broken if those mica-lines had not been there?

A. So help me, no. (Tr., p. 430.)

On the other hand, the Government witnesses could not recall that they had observed any condition that could be described as slate-like cleavage. Ackerman could not remember noticing it, although he went through the tunnels twice a week. Neither Walter nor O'Donnell were able to observe it. Indeed, the latter, whose observations of the tunnels were the most frequent, described the rock below the weathered zones as "chiefly blocky rock." Such rock would break along the joint lines but not necessarily in thin sheets. Dr. Walton made his observations on the condition of latent sheeting from core specimens, taken from along a road cut made in the hillside above the tunnels in the course of the work. He could not identify the condition of latent sheeting on any of the photographs of the insides of the tun-

nels offered in evidence by the Government. Stearns in his report referred to the "neatly constructed sections of the tunnel on both sides of the caving ground," which, if anything, would indicate that the excavation outside the weathered zones had been normal. When Dolan was asked, moreover, whether after Stearns' visit it had been more difficult to excavate, he replied: "I don't believe so" (Tr., p. 310). The fact, already mentioned, that little cribbing was installed outside the weathered zones, and that even the curtailment of steel supports was considered is inconsistent with the existence of excavation difficulties. Finally, it does not follow from the mere existence of the condition of latent sheeting, that it would actually make excavation more difficult or contribute to overbreak.¹³ On the contrary, it could actually have a beneficent effect by causing the rock to break along the desired lines of excavation. Indeed, Dr. Walton himself admitted this.

In its letter of July 8, 1954, the appellant requested by way of relief the following:¹⁴ (1) the application of an overbreak ratio of 5 percent, which would reduce the overbreak charge of \$200,304.00 to \$84,905.00; (2) additional excavation costs in the weathered zones in the amount of \$64,169.66; (3) additional costs of installing timber within areas outside of the weathered zones in the amount of \$22,360.40; and (4) the remission of the overbreak charge for 734.7 cubic yards of timber left embedded in the concrete, and hence replacing an identical quantity of concrete (at \$20 a cubic yard this would amount to \$14,694). In addition to the extension of time of 12 days previously requested, the appellant now requested a further extension of time of at least 100 days, by reason of the changed conditions, and also by reason of the more difficult weather conditions that prevailed during the invert operation, and which, it asserted, would not have been encountered if there had originally been no delay in procuring steel.

In view of the negative result which the Board has reached with respect to the merits of the appellant's claims, the Board does not deem it necessary to resolve certain perplexities presented by the fact that the appellant in its brief has somewhat reformulated its original claims, or to pass on the contention most earnestly advanced by the Government that the appellant failed to give timely and sufficient notice of having encountered changed conditions in the tunnels elsewhere than in the weathered zones. But, since it is apparent from the correspondence and other facts of record already recited that the appellant delayed for a long time after the tunnels were

¹³ See *Wm. Crumpacker & Sons Co., Eng.* C&A Board No. 523 (January 15, 1954), in which the Board made such an observation in connection with a similar problem.

¹⁴ This is exclusive of relief requested in connection with two other claims, which will be more particularly described below where these claims are considered.

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holed through before claiming that it had encountered changed conditions throughout the tunnels, and since article 4 of the contract required not only that notice shall be given "immediately" to the contracting officer but also that it shall be given before conditions are disturbed, the Board in assessing the evidence will give some consideration to the implications that are inherent in the staleness of certain aspects of the claim that changed conditions were encountered throughout the tunnels.

To establish a meritorious claim under the "changed conditions" article of the contract the appellant must show that the conditions encountered fall into one of the two categories of conditions contemplated by that article. A claim is made out under the first category if the contractor has established that he has encountered conditions materially different from those indicated by the drawings or specifications. As the Government in the present case expressly repudiated, in paragraph 37 of the specifications, any notion that it was guaranteeing geological conditions, and expressly provided, in the third subparagraph of paragraph 51 of the specifications, that no additional allowance would be made for tunnel excavation "on account of the nature or condition of any of the material encountered," it is clear that the condition of the material was not the subject of any representation made in the specifications. So far as the drawings are concerned, while they contained in summary form logs of exploration (or drill hole information), these were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.¹⁵ Moreover, as will be shown in the discussion of changed conditions in the second category, if the logs of exploration were to be regarded as representations of what would be found throughout the length of the tunnels, they were not to the effect that no adverse excavation conditions would be encountered. On the contrary, the conditions encountered were in general substantially similar to those represented in the drawings.

The Board holds that the appellant did not encounter changed conditions within the meaning of the first category of article 4. A claim may be made out under the second category of the article, however, by establishing the existence of conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor. The Court of Claims has held ¹⁶ that conditions in this

¹⁵ The Board has held in the two *Carson Construction Company* cases that borings or test holes that are not themselves guaranteed do not constitute definite representations on which a contractor may rely. 62 I. D. 311, 321 and 422, 431 (1955).

¹⁶ In such cases as *Hirsch v. United States*, 94 Ct. Cl. 602 (1941), *Chernus v. United States*, 110 Ct. Cl. 264 (1948), *Loftis v. United States*, 110 Ct. Cl. 551 (1948), and *Shepherd v. United States*, 125 Ct. Cl. 724 (1953).

category may be found to have existed, notwithstanding the inclusion in the specifications of such caveatory, or exculpatory provisions as were included in paragraphs 37 and 51 of the specifications in the present case. This doctrine rests upon the necessity of reconciling the specifications with the provisions of article 4. The purpose of article 4 is, however, to protect prudent contractors against unforeseen abnormalities, and a contractor who ignores the warnings in the specifications and all warning signs that would have been revealed by a reasonably thorough investigation is not entitled to the benefit of the article. The burden of proving a claim that falls in the second category of the article is a fairly heavy one, since the contractor must show not only that he encountered conditions that were unexpected to him but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Otherwise, as the Board has said, article 4 would become "the Achilles heel of every construction contract."¹⁷

The record in this case is so voluminous that it will not be possible for the Board to explore the contentions of the parties in exhaustive detail. It will, rather, proceed to state briefly under various topical headings its reasons for rejecting the claim of the appellant that it encountered changed conditions.

The import of the provision for steel supports. The appellant should have regarded item 4 of the schedule, which made provision for 2,000,000 pounds of steel supports, as a warning of difficulties that might be encountered in excavating the tunnels. Tunnels that required full support would hardly be expected to be drilled through very good rock. 2,000,000 pounds of steel was sufficient to support the tunnels throughout their lengths; and the expectation of the Bureau was that the tunnels would require such support. Moreover, Bloodgood testified that this was the first tunnel in connection with which the Bureau had figured on full support. As events proved, the Bureau's calculations were fairly close to the amount of steel for which it paid the appellant under item 4, which was 1,689,857 pounds.

It is the appellant's contention that the warning implicit in item 4 of the schedule was less ominous than it seemed. It is alleged that "there is unrebutted testimony of the appellant's witnesses (namely, Dolan and Foss) that it was common practice for the Bureau of Reclamation to specify enough steel to support the full length of proposed tunnels in order to avoid the possibility of a future shut-

¹⁷ See *L. D. Shilling Co., Inc.*, 63 I. D. 105, 116 (1956). The appellant itself seems to have been in some confusion concerning the precise theoretical basis of its claims. In its first letter of September 23, 1952, it seemed to state a claim under the first category of article 4 but in its final letter of July 8, 1954, it asserted the claim under both categories of article 4, at least in so far as the weathered zones were concerned. The "latent sheeting" claim was, however, referred exclusively to the second category of article 4.

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down of the project for lack of materials," and that "Although they had ample opportunity to do so, the Government's witnesses did not deny that such a practice existed." The Board finds itself unable to accept this contention or the reasoning on which it is based.

Bloodgood's testimony that the tunnels in this case were the first to require full supports is itself a denial of any common practice. Moreover, neither the testimony of Dolan nor of Foss really amounts to any assertion of a common practice. Dolan merely testified that the contractor's executives hoped that they would be able to get by with supporting the tunnels to the extent of 50 percent only (Tr., pp. 83-84, 212, 235, 275). Again, it is not apparent how Dolan, who had had no previous tunnel experience, would be in a position to know of any common practice. As for Foss, he merely testified that "ordinarily" it was the policy of the Bureau to "ask for sufficient to support the entire tunnel," and he employed the term "common practice" only in relation to the work which his firm had done for the Bureau (Tr., p. 347) without indicating whether it had previously done any other comparable tunnel jobs for the Bureau. However, even if Foss's testimony could be construed as the assertion of a common practice, the Board could give it no weight in view of the fact that the appellant not only actually ordered 2,200,000 pounds of steel, which was 200,000 pounds more than the Bureau's estimate, but also that the appellant would not commence tunnel excavation until it had been assured of the delivery of at least 1,000,000 pounds of steel. Actions speak louder than words. Moreover, if the appellant's executives had any doubts concerning the significance of the provision for full supports, they could readily have resolved the doubt by addressing a proper inquiry to the Bureau.

The appellant's pre-bid investigation. In every case involving a claim of changed conditions, the Board has emphasized the importance of the contractor's pre-bid investigation, and the making of as careful a site examination as the circumstances of the case may require. The appellant contends that it made a careful investigation, and concluded that it would encounter good tunneling rock. The record does not support this contention.

The site of the tunnels was examined by Dolan and Foss on a day in the middle of November 1952, and their examination appears to have been hurried. Upon their arrival at the project office, they were met by one Jerman, who was then the Resident Engineer of the project, and who accompanied them during their examination of the site. The party went by the Forest Service Road, and crossed the river on a footbridge that led directly to the tunnel portals. There was some snow on the ground that day but it was not enough to

obscure the portals. Although Dolan and Foss viewed the upstream portals and were shown the approximate vicinity of the downstream portals, they did not take the trouble to walk the lines of the tunnels, or clamber up the hillside. Thus it took them only about two hours to complete the site examination.

Dolan testified that in the course of their visit Jerman pointed out to them the blockiness of the rock which they could see at the portals, but told them that "the rock tightened up as it got back into the mountain." Dolan also testified that it was his "understanding" that Jerman had been in charge of "the Government's drilling party" (Tr., p. 29). Presumably the purpose of this was to show that by reason thereof Jerman was in a specially good position to know what the conditions of the rock were inside the mountain, but the record does not show precisely what he did in supervising the drilling party, and hence it does not appear that he had any knowledge that was superior to that of other project personnel. Moreover, the knowledge which anyone could have had with respect to the condition of the rock inside the mountain was subject to obvious limitations. In any event, there is nothing to show that Jerman was authorized to make any statement to prospective bidders, and his puff was, therefore, in no way binding on the Government.

The day that Dolan and Foss spent at the Palisades project was spent in part also in the project office where they examined the drawings and specifications and the physical cores of the drill holes, which were made available to bidders for their examination. It is obvious that the descriptions of the drill holes on the drawings themselves were merely summaries and that the physical cores themselves were the primary and best evidence of what was ascertained by the drilling of the holes. Appellant, being aware of the existence of the physical cores, was, therefore, chargeable with any knowledge of conditions which could have been obtained by an examination of these cores.¹³

Dolan and Foss do not appear, however, to have spent much time in examining the physical cores which were on display. Dolan testified that he spent from an hour to an hour and a half in this examination, and that he looked at seven or eight of the cores, confining his attention apparently to the cores of the drill holes which appeared on the tunnel profiles. Moreover, he did not ask such significant questions as whether there had been loss of water on any of the cores, even though he thought that this would indicate the existence of bad cracks and fissures, or whether there had been crushing of cores in the core barrels. As for Foss, it is apparent from his testimony that

¹³ See appeals of *Mellon-Stuart Company*, Eng. C&A Board, No. 197 (May 15, 1951), *Charles H. Tompkins Company*, Eng. C&A Board, No. 606 (August 16, 1955), and *Selby Drilling Corporation*, Eng. C&A Board, No. 729 (January 16, 1956).

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he knew little or nothing about core drilling, and that he hardly did more than glance at the cores. He was, moreover, not particularly concerned about the presence of clay, which he felt, apparently, was Dolan's province, and he was "more interested in the cores to get the structure of the rock" (Tr., p. 358).

It should be particularly noted again in this connection that the Palisades tunnels represented Dolan's first tunnel job. Williams, who was the man in the appellant's organization who was the old hand at tunnels, did not participate in any way in the preparation of the appellant's bid. While Foss, too, had some tunneling experience, it was not in connection with the type of tunnels involved in the Palisades project.

The appellant puts special emphasis upon the fact that at the time of bidding neither Dolan nor Foss was aware of the existence of the Dupree report of 1947, and that its existence was not called to their attention by any representative of the Government.¹⁹ It is easy to understand the reason for this emphasis. The Dupree report contained a dire predication of excessive overbreak, as well as other hints which would have perturbed any bidders, and the predictions rested, moreover, on observations made by Dr. Charles P. Berkey, perhaps the leading consulting geologist in the Western States. Now the Board has no reason to doubt that Dolan and Foss had not actually become aware of the Dupree report until long after the appellant had placed its bid, and it does not charge them with knowledge of its contents with respect to matters where such knowledge would be material. Their failure to ascertain whether such a report existed is, however, only a further indication of the casualness of their pre-bid investigation. The Bureau of Reclamation is constantly putting out reports in connection with contemplated irrigation or power projects. How the appellant's executives could assume that such a project as the Palisades project would be undertaken by the Bureau without the preparation of a preliminary geological report strains credulity.²⁰

Apparently, neither the Government nor the other bidders took as optimistic and sanguine a view of the job as Dolan and Foss. The

¹⁹ Dolan learned of the report apparently a few weeks before Stearns' visit to the Palisades Project in November 1952. Foss testified that he did not know of the Dupree Report until after completion of the job (Tr., pp. 59-60, and 339).

²⁰ It is highly significant that when Dr. Walton, who had made a study of the specifications and drawings, was asked at the hearing whether in his course of the investigation of the site he had become aware "of a geologic report known as the Dupree report," he replied: "Well I was perfectly certain that there must have been a preliminary geologic study of this site as a basis for the preparation of the contract documents, and so when Mr. Dolan took me to Mr. O'Donnell's office, and introduced me to Mr. O'Donnell, one of my main objectives in making this call was to ask him if such a report existed * * *" (Tr., p. 888). What was surmised by a Yale professor of geology who had had no direct dealings or contacts with the Bureau of Reclamation should no less readily have been surmised by the appellant's executives.

final Government estimate of its cost was \$2,049,000,²¹ or approximately 40 percent higher than the appellant's bid of \$1,242,700. The next lowest bid was \$1,576,000. In all a total of 17 bids were received, ranging all the way from the appellant's bid to \$3,038,500. Apparently the other bidders did not share the appellant's optimism in estimating the probable costs. Their bids might, perhaps, be viewed as in effect a judgment on the part of the appellant's competitors of what was "generally recognized as inhering in work of the character provided for in the plans and specifications." While the purpose of article 4 is to encourage bidders to make the lowest possible bids by eliminating unknown contingencies, it is not intended "to encourage prodigal bidding in the face of readily ascertainable conditions."²²

The nature of the geological conditions. The Board has already indicated in its general review of the appellant's operations in the tunnels that the difficulties which it encountered were not abnormal, and that such difficulties as were encountered were surmounted by normal tunneling methods. It remains only to determine whether the ascertainable geological conditions were such that the appellant should have been warned of the difficulties which it actually encountered. Before proceeding to comment on the surface exposures, the physical cores, and the drill hole information on the drawings, however, some preliminary observations are in order.

The Board credits the testimony of the Bureau witnesses that some difficulties are to be expected in any tunnel construction work. Indeed, this much is obvious. Foss went even further in his letter of January 26, 1953, to Ackerman, for in it he stated: "We are fully aware that no one can absolutely guarantee underground conditions that may be encountered in tunneling work."²³ Weathered zones of broken rock are encountered in almost every tunnel, and the existence of clay seams, too, is quite common. Rock tends to alter into clay as it weathers, and, hence, weathering is an indication that clay may be encountered.

²¹ Bloodgood testified that, in preparing the estimates, he had consulted with Oscar Rice (now chief of the Design Division of the Bureau), who had visited the project during its early days, and who, although not a geologist, had a good opinion on materials, and also with Leigh Cairns, then Bloodgood's assistant, who had had a lot of experience in bidding for contractors. Rice advised Bloodgood that "the evidence indicated quite a lot of broken unsound material," and that he was "considerably concerned" about "the sides of the mountain where the abutments of the dam would go" (Tr., p. 580). Having already advertised for enough steel to completely support the tunnels, the conferees decided to raise their original estimate by \$160,000.

²² See *L. D. Shilling*, 63 I. D. 105, 117 (1956).

²³ The Board also perceives no good reason for rejecting the testimony of Walter, which is un rebutted, that shortly after the bids were opened Foss told him in the course of a conversation that "because of the appearance of the rock at the portals of the tunnels, the upstream portals, the way the rock laid, and the fractured and jointed condition of the rock, that he expected considerable overbreak in the upper quadrants of the tunnels" (Tr., p. 690).

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All the witnesses who testified with respect to the surface exposures of the rock agreed that the rock was columnar in formation but disagreed with respect to the extent of its weathering, jointing and breakage. Dolan, who testified on direct examination that the rock was columnar, dipping from east to west, and that the face of the rock was clear, did concede that there was "a small amount of weathering on the surfaces of the joints, the more or less vertical joints" but he did not consider the degree of weathering to be abnormal (Tr., p. 29). Foss testified that "I couldn't visualize any great amount of trouble portaling into this tunnel, from the material that I saw on the surface" (Tr., p. 324).²⁴

The Government witnesses, who also had an opportunity to view the rock before it was disturbed, did however, anticipate trouble. Ackerman testified that the rock was "columnar, badly jointed, and a lot of more or less vertical seams laying with the plane of the rock, of course, and there were a great number of horizontal seams," and it seemed to him that "in drilling the tunnel in breaking off through these columnar structures that you would get a considerable amount of overbreak" (Tr., p. 454). He also testified that clay seams should have been expected in view of the surface exposures. Walter, who visited the Palisades project before the opening of bids, testified that "considerable rock was exposed at the upstream tunnel portals and the rock appeared to be massive andesite, columnar andesite with many joints and cracks. The rock was hard, dense" (Tr., p. 680). He also referred to the rock as "fractured and jointed," and while he agreed that generally rock improves with depth, he added that such would not be the case invariably.

In view of several photographs in the record, including two included in the Dupree report, as well as other indications in the record, the Board must accept the testimony of the Government witnesses with respect to the nature of the rock outcroppings. The photographs clearly illustrate the broken nature of the surface exposures. One of the photographs in the Dupree report shows a considerable accumulation of talus at the base of the left abutment, and another shows the jointed and broken condition of the rock.²⁵ In the report itself it is stated that, while in some of the surface exposures, the joints are

²⁴ Stearns, who stated in his report that the surface exposures indicated stable rock, did not, of course, view the rock prior to bidding.

²⁵ When on cross-examination Dolan was shown this photograph he agreed that it showed "broken rock, there is no question about that" (Tr., p. 8). On redirect examination Dolan attempted to retreat, but not very successfully, from this admission by explaining that the picture shown him had looked "like some of the better rock that we encountered" (Tr., p. 270). Incidentally, the mere fact that Dolan testified that Jerman had assured him that the rock would tighten up inside the mountain, shows an awareness on his part that he was observing an unfavorable condition.

widely spaced, in others they are closely spaced, and also broken (p. 30 of the report), a condition that was aptly described by Dr. Walton as one of "random jointing." On the next page of the report it is stated: "It is in the more closely jointed areas where the overbreak is anticipated to be large." It appears from the report that Dr. Berkey visited the project in July 1947, and was greatly concerned about the closely jointed condition of the rock, although on the whole he regarded the rock of the left abutment as "an exceedingly sound rock" (Dupree report, p. 21). It is apparent, however, from the observations in the Dupree report as a whole that soundness of the rock had its exceptions. And, in speaking of such an igneous rock as andesite, it must be remembered that soundness is a relative conception. As Dr. Walton put it more than once, the andesite was good "for this type of rock" (Tr., pp. 875, 876). A "good" rock is not necessarily a good rock for tunneling purposes.²⁶

As for the condition of latent sheeting, even if it were to be found that it was a condition that prevailed in the areas of the tunnels downstream from the weathered zones, and that increased the difficulties of the excavation, it could not be considered an "unknown condition" within the meaning of article 4, since it was a condition which could readily be detected at the time of the bidding. The existence of surface exposures of the platy structure of the rock was noted in the Dupree report in which it was stated: "In some surface exposures, the rock has a platy structure" (p. 21). Dr. Walton found it "abundantly displayed" in the rock that was exposed all around the tunnel site (presumably he was referring to the open road cut above the tunnels). And, even if the evidence were insufficient to establish that it would be observable at the original ground surface, latent sheeting is quite a usual condition in igneous rock, and according to Dr. Walton, unusual only in such thick sills as that of Calamity Peak. However, he also testified that an observer would have to know "a good deal about geology" to be aware of this distinction (Tr., p. 914). Indeed, Foss conceded that this was "something that I don't understand anything about" (Tr., pp. 371-72).

In any event there was evidence of latent sheeting in the cores of the drill holes. Dr. Walton, who examined the cores when he was at the Palisades Project, testified that there was evidence of platy fracture "in greater or lesser degree in almost all of the cores" (Tr., p. 886), and that, moreover, a contractor could see "the physical evidence that is there which plainly shows the sheeting lines," and that he "presumed" that a contractor could make his own interpretation "of

²⁶ As Bloodgood vividly put it: "You can have rock, which we have had, that makes good concrete aggregate, but it is like plowing through a box of crackers for tunneling purposes" (Tr., pp. 651-52).

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what the condition indicated" (Tr., pp. 913-14). On a core of approximately a foot and a half taken from D. H. 116, Dr. Walton counted no less than 21 dark bands indicating the condition of latent sheeting (Tr., pp. 924-25). In addition to the indications on the cores themselves, the log of D. H. 66 contains the notation: "Slatelike cleavage from 285 ft. to 306 ft."²⁷

The mention of the log of this drill hole brings the Board to the subject that more than any other has been most heavily explored in this case. The appellant has concentrated on the drill log data in the specification drawings in preference to the data which would have been revealed by the drill cores themselves, preferring, apparently, the secondary to the primary sources of information. The depth, location, angle, description, and relative importance of the drill holes favored by each side has been minutely examined, analyzed, and discussed, both at the hearings and the briefs. It is apparent, therefore, that in dealing with this subject particularly the Board cannot, without unduly extending this opinion, follow the example of the parties but must confine itself to the most general observations. To state the Board's ultimate conclusion first, it agrees with the Government's contentions rather than those of the appellant with respect to the significance of the drill hole information.

The appellant has concentrated on the relatively small number of drill holes shown on the drawings for particular sections of the tunnels. For the outlet tunnel, it has selected D. Hs. 32-C, 5 and 105, and for the power tunnel, D. Hs. 80, 117, 116 and 106, and has chosen to disregard or minimize other drill holes, shown on the drawings, in the general vicinity of the tunnels, which were of greater or comparable importance, such as D. Hs. 112, 113, 66 and 67. Its general procedure has been to project favorable drill hole information longitudinally for inordinate lengths along the lines of the tunnels—in one instance for more than 900 feet²⁸—on the theory that such information "controlled" such lengths of the tunnels, while virtually ignoring unfavorable drill holes much shorter distances away laterally from the lines of the tunnels.

As a matter of fact, the holes on which Dolan and Foss relied did not justify their roseate views. While they were drilled fairly close to the center lines of the tunnels, they were for the most part rather

²⁷ Thus the statement in the appellant's letter of July 8, 1954, that none of the latent sheeting was reported by the contract borings was not entirely correct. Dr. Walton expressed himself as somewhat mystified by the failure to note the condition on the logs of many other cores, but Bloodgood suggested that "whoever logged these other holes had different terms for them" (Tr., p. 662).

²⁸ To quote Dolan: " * * * you have got a hole here and a hole here, and they both show the same rock, you normally would expect the same material in between, unless you had further proof that that didn't so exist" (Tr., p. 50).

shallow holes, or were angular holes that dipped away from the tunnels or were too near the portals to be overly significant, being in the shallow portion of the rock mass, and only one of them, D. H. 4, was an indisputably good hole, although D. H. 32-C and 117 also showed fairly good rock. On the other hand, of the drill holes emphasized by the Government, D. Hs. 112 and 113 in particular showed more broken rock than those near the portals, and were not only drilled into the higher portion of the rock mass but were closer to the weathered zone at the depth which corresponded with the elevation of the tunnels. In his letter of December 16, 1953, to Ackerman, Foss conceded that "DHs 112, 113, 66, 67 and 101 showed rock more nearly representative of that encountered in the Power and Outlet tunnels, at least they do describe badly broken, weathered rock with sand and clay seams" but dismissed them on the ground that all these holes were in closer proximity to the spillway tunnel. However, at the hearing, Dr. Walton testified that D. H. 113 was "important" (Tr., p. 909),²⁹ and that it was "a clue to an undesirable condition" (Tr., p. 915).

Viewing the drill holes shown on Drawings 456-D-45 and 456-D-46 as a group, it appears that 15 out of the 25 drill holes refer variously to weathering, alteration or staining as characteristics of the rock. In connection with a considerable number of these holes, some of them either in close proximity to the tunnels or passing through the tunnel planes, the rock was described either as "broken" or "badly broken" or as "jointed," which might mean badly jointed rock. While the logs did not indicate the degree of jointing, this could be determined from the drill cores.

As for the troublesome seams of clay encountered by the contractor in the weathered zones, the exploratory drilling was a particularly unreliable method of ascertaining their existence. Core drilling will not necessarily reveal the presence of clay seams. As Dr. Walton himself testified: "Where you have steeply dipping features and steeply dipping drill holes, it is quite possible to go down along side of some bad feature for a long distance and never suspect its presence from the drill holes" (Tr., p. 914). Even when the driller encounters

²⁹ The appellant seeks to avoid the force of the testimony of its own witness in rather curious ways. It makes much of the fact that the log of D. H. 113 as reported on the drawings did not indicate "caving" at a particular depth which was shown in the more precise Dupree report. However, the worst condition that would be indicated by caving would be broken rock, which the log did indicate in abundance. The appellant also argues that Dolan and Foss did not consider the mere indication of badly broken rock as too adverse a condition. As a matter of fact neither Dolan nor Foss paid any attention to this drill hole simply because it was "too far away" (Tr., pp. 45, 55, 345), and, of course it is not true that an indication of badly broken rock was to be taken lightly; the testimony of all the witnesses, including Dolan and Foss, is to the contrary. If the appellant's arguments are to be taken seriously, it had little to complain of, since, except for the clay seams in the weathered zones, the worst condition it encountered anywhere was some broken rock.

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clay seams, the clay may be washed out by the drill water, and the driller will not know whether he has struck clay or an open joint, or a cavity. However, when clay has been encountered, the cores may show evidences of discoloration which will alert an experienced observer. Thus, the logs of D. Hs. 67, 70, and 101 did note the presence of clay in the rock.

In the conception of the appellant's key witnesses exploratory drilling was apparently an exact science, capable of pin pointing trouble infallibly.³⁰ But the appellant's own geological expert Dr. Walton, conceded that there was another view of exploratory drilling and more correctly described it as "a sampling operation" (Tr., p. 931). Further, he also stated in his report to the appellant that "the amount of exploratory drilling in the andesite mass was inadequate to reveal in sufficient detail the structural conditions affecting tunnels of the size and lengths of the tunnels in this rock * * *" (p. 15). The reliance of the appellant's executives on the drill hole information as negating trouble in the undrilled stretches of the tunnels was thus misplaced. In view of the diversity of the conditions revealed by the exploratory drilling, it could not reasonably be assumed that the zones of good, bad, or indifferent rock would be distributed in a consistent pattern. As the exploratory drilling was a sampling operation, moreover, bidders could not reasonably assume that the materials would always come up to the best sample. On the other hand, sometimes the materials could be as good or better than the worst samples.³¹

The appellant bases its claims not only on the drill holes which were indicated on the drawings and did not come up to its expectations but also on two drill holes which were omitted from the drawings for the power and outlet tunnels, namely D. Hs. 64 and 65. The omission of these drill holes is charged as a material "misrepresentation." As a claim based on misrepresentation is one for unliquidated damages, the contracting officer was quite right in holding that it could not be considered, and his decision is affirmed.

The percentage of overbreak. Assuming for the purpose of the case—without necessarily deciding the question—that the provision for an equitable adjustment in article 4 of the contract would author-

³⁰ This is best illustrated perhaps by the attitude of the appellant towards D. H. 116. This was a vertical hole approximately 20 feet east of the center line of the power tunnel at elevation 5459.9. It was described on Drawing 456-D-46 as "Andesite, talus, sand, fine, clay and gravel, compact. Andesite, jointed, badly broken 15.6'-22.0', 28-35', 52-58'." This was obviously not a hole of good augury, considering especially that the top of the tunnel was 60 feet below the surface at this point and the badly broken rock was indicated to be only 2 feet above the top of the tunnel. Yet Foss testified that "you would have a pretty good chance to slip through there without any trouble * * *" (Tr., p. 333); and the appellant argues that the hole was not regarded as overly important. There are other illustrations in the record of the same sort of reasoning.

³¹ Thus, while D. H. 4, which was a good hole, came up to its promise, the unfavorable conditions suggested by D. Hs. 66, 67, 105, 106, and 116 for the areas downstream from the weathered zones were not actually encountered.

ize the Board to remit the overbreak charges in whole or in part, it must be realized that the extent of the overbreak is at most only one of the elements to be considered in determining whether the appellant did encounter changed conditions. Moreover, a determination that the percentage of overbreak was excessive cannot be made solely in terms of geological conditions but requires also the evaluation of factors of engineering practice and labor economics that affect the extent of the overbreak. Thus, mere proof that the percentage of overbreak was somewhat larger than even the Government expected would not be sufficient in itself to establish that the appellant encountered changed conditions. It would be at most only one of many relevant circumstances, and it would have to be strong enough to overcome decisively the force of the other circumstances which, the Board has already indicated, do not establish the existence of changed conditions. The appellant has the burden of proving that the percentage of overbreak was so excessive that it negates the inferences to be drawn from all the other circumstances. The Government, on the other hand, does not have to prove that any particular percentage of overbreak was normal or abnormal. Although the appellant produced at the hearing a geologist to testify concerning the nature and condition of the rock, he readily acknowledged that he was no expert in the engineering problems of tunneling.³²

The Government has shown that the percentage of overbreak in tunneling jobs generally has been strongly influenced by the high cost of labor, particularly since the last war. A tunneling contractor is put in a position between the devil and the deep, which in his case is a choice between shooting "loose" and shooting "tight." If he shoots loose, he will increase the percentage of overbreak. If, on the other hand, he shoots tight, he may have to do a considerable amount of plugging and hand trimming before he can install the supports, and these methods naturally entail high labor costs. Even worse perhaps they slow down operations. A contractor, therefore, who is behind schedule in his operations has a particularly strong temptation to shoot loose, particularly when he is working under a contract that imposes a high rate of liquidated damages for delay. The appellant was finally assessed no less than \$33,600 for its delay; the liquidated

³² In his report Dr. Walton stated that the purpose of his investigation was "to determine the causes of excessive overbreak in the tunnels" (p. 1), and concluded that the geological conditions which were described by him were in his opinion "major causes for the overbreak" (p. 15). At the hearing, however, he explained that such statements in his report should not be read out of context, and that his testimony was intended to be confined solely to the mineralogical features of the rock, and he expressly added that "I quite recognize that various types of engineering practice also have an effect on overbreak" (Tr., pp. 900, 902). This recognition explains no doubt the decision of the Government not to call the geologists of its own choosing who were present at the hearing. The Government did not in the main challenge Dr. Walton's purely geological conclusions, although it did point to his limited opportunity for observation of the original geological conditions.

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damages thus represented no less than 16 percent of the overbreak charge of \$200,304. In these circumstances the Board can readily accept the Government's testimony that the appellant was tending to shoot loose.³³

Loose shooting is more likely to occur in large supported tunnels than in small unsupported tunnels because of the greater scale of the operations and the greater difficulties in methods of excavation and support. If the shooting is tight, it will be more difficult to install heavy steel supports, and to trim the rock points high above the tunnel floor before the supports can be installed. Where supports have been installed near the heading, the drillers must angle their drills outwards, in order to make it possible for the drills to clear the last support, and since it is not practical to hold the drills on a precise line, the shooting tends to go beyond the pay lines. It has been the general experience of tunneling contractors that overbreak will be much greater in a supported than an unsupported tunnel.³⁴

A comparative statistical analysis of any phenomenon has obvious limitations but, in so far as such an analysis is instructive, the Government introduced a table showing that average overbreak on a considerable number of tunnels was .932 feet, which was close to the average overbreak in the power and outlet tunnels.

So far as experience is concerned, it is valuable where the conditions are comparable. The experience of Foss was generally in smaller tunnels which were constructed many years ago when hand excavation methods were less costly, and some of these tunnels were in earth materials. On the other hand, Bloodgood testified that the overbreak on the Bacon Tunnel of the Columbia Basin project, which was 24 feet in diameter when finished, and almost 2 miles long, and which was driven through columnar basalt, a rock similar to andesite for tunneling purposes, was approximately 10 percent, despite the fact that it was supported to a small extent only. Bloodgood also testified that in the case of the Glendo tunnel, constructed subsequent to the spillway tunnel of the Palisades project, the overbreak was 9 percent. This tunnel was 31 feet in diameter; it was driven through sandstone and limestone that are considered good tunneling materials; and it was supported throughout its length down to the spring line.

It is true that the experience of the appellant in the spillway tunnel was not comparable to that in the power and outlet tunnels of the

³³ It should be pointed out, however, that the Government does not charge, and that the Board does not find, that the loose shooting constituted negligence. It was simply the appellant's chosen method of operation.

³⁴ The appellant's demonstration that if the depth of overbreak remains constant the ratio of the overbreak quantities to the quantities of tunnel excavation decreases in inverse proportion to the size of the tunnel, is correct as a mathematical proposition but is otherwise pointless.

Palisades project. The spillway tunnel is approximately 200 feet to the west of the power and outlet tunnels, and lies deeper in the rock mass through which the tunnels were drilled, although at a somewhat higher elevation; it is of approximately the same length and width as the outlet tunnel, and in the schedule of the Palisades contract 1,739,000 pounds of steel supports was estimated in connection with its construction, which would seem to have been sufficient steel for full support of the tunnel. The appellant bid \$11.70 a cubic yard for the excavation of the spillway tunnel, although its bid on the power and outlet tunnels had been \$10.05,³⁵ and it estimated that the overbreak on the spillway tunnel would be 6 percent.³⁶ As it turned out, only approximately one-third of the spillway tunnel had to be supported,³⁷ and the percentage of overbreak experienced was 5.74 percent. However, the percentage of overbreak in the supported sections of the spillway tunnel was significantly 12.28 percent as compared to 2.66 percent for the unsupported sections of the spillway tunnel.³⁸ The appellant expected to encounter more trouble in excavating the spillway tunnel than the power and outlet tunnels, and actually had less trouble. If this proves anything, it is that tunnel excavation is rather unpredictable.

It is true, also, that the 11.6 percent of overbreak experienced by the appellant was somewhat larger than the 10 percent of overbreak which the Government estimated prior to the letting of the contract. Bloodgood who testified to this effect also considered, however, that the 11.6 percent was "within range" (Tr., pp. 607-08). The remission of even 1.6 percent of the overbreak charge would, to be sure, allow the appellant to recover no less than \$27,628.16, and a strong case could be made for such a remission if it could be established that the excess over the estimated percentage of the overbreak was attributable to worse geological conditions than even the Government anticipated in making its estimate. On the basis of the present record, however, it cannot be concluded that such was the case. As has been shown, the geological conditions were not worse than was indicated by the available data. Moreover, too many other factors, which the

³⁵ Dolan testified that the higher bid was motivated by the fact that the appellant would not be operating headings side by side. On the other hand, the appellant would have no moving-in costs on the spillway operation (Tr., pp. 158-59).

³⁶ The Palisades contract under which the spillway tunnel was constructed provided no charge for overbreak. It was, nevertheless, a matter of concern to the contractor, since the Government made no payment for concrete outside the "B" lines. However, the Government was obligated to supply the cement for the overbreak areas if they were not the result of the carelessness of the contractor.

³⁷ There were three sections that required support: from Stations 7+72 to 8+92; from Stations 18+92 to 21+32; and from Stations 22+72 to 23+88. This would make a total of 476 feet that required supports.

³⁸ These figures are based on Government computations, which the Board believes to be more reliable than a computation made by the appellant. The appellant's computation was 9.8 percent for the supported, and 5.4 percent for the unsupported sections of the spillway tunnel, with an average overbreak of 6.88 percent.

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Government did not, and could not anticipate, intervened for the Board to be able to say that the appellant was not responsible for the somewhat larger percentage of overbreak than the Government originally calculated.

On the basis of all the evidence, the Board finds that the appellant did not encounter changed conditions. It follows that it must reject the appellant's general request for the remission of the overbreak charges and its claim for the additional costs of excavation in the weathered zones of the tunnels. It follows, too, that the appellant's claim for timber installed outside the weathered zones, and its request for remission of the overbreak charges for the total volume of timber left in the tunnels must be rejected, in so far as they rest upon changed conditions. Furthermore, relief may not be afforded on the theory that the installation of cribbing constituted a change in the requirements of the specifications. In view of the Board's findings with respect to the installation of the cribbing, it is clear that the appellant was neither directed to install it, nor to leave it in the tunnel, and that the decisions of the Bureau to permit the installation of the cribbing, as well as to allow the cribbing to remain in the tunnels, were actually for the convenience and benefit of the appellant, which apparently viewed cribbing as being less expensive and easier to install than the permanent types of support specified by the contract. There is furthermore no proof that the value of the cribbing to the appellant was greater than the cost of its removal would have been. Cribbing was a form of "temporary timbering" within the meaning of paragraph 53 of the specifications, and subdivision (c) of the last paragraph of paragraph 51 expressly provided that the price per cubic yard for tunnel excavation, as set out in item 3 of the schedule, was to include the entire cost of "Furnishing, erecting and removing temporary timbering in tunnels, if used." As for remission of the overbreak charge by reason of the timber that was embedded in the concrete, such a remission would be entirely inconsistent with the terms of paragraph 51 of the specifications under which the overbreak charge was to be determined solely by the extent of the overexcavation.

Other Claims for Additional Compensation

(a) *Claim based on excavation for lagging.* The appellant claims that it excavated an additional two inches below the spring lines of the power and outlet tunnels throughout their lengths in order to provide space for installing steel lagging outside the steel ribs and that, although such excavation amounted to 307 cubic yards, the Government paid it for only 121 cubic yards of such excavation.

This would leave a balance of 186 cubic yards unpaid for. By way of relief the appellant seeks payment for this 186 cubic yards at the contract price of \$10.05 a cubic yard, which would be \$1,869.30, and cancellation of the charge for overbreak at \$20 a cubic yard, which would be \$3,720. The total of the claim is, therefore, \$5,589.30.

Except for a few pieces of lagging installed as spacers between the steel ribs, the appellant did not actually install lagging, however, downstream from the weathered zones, and it concedes that it was never specifically directed to excavate for this lagging. Indeed, the question of payment for this excavation was not raised by the appellant until after the tunnels had been entirely completed. The appellant contends, however, that it was impractical to determine after each round was blasted and mucked out what supports would be needed, and whether the next round should be shot to provide for such supports, and that if provision had not been made for the space for the lagging, it would have been confronted by expensive handscaling operations. The contracting officer, nevertheless, found to the contrary, and O'Donnell testified that it was not necessary to excavate to the enlarged dimension to provide additional space for the lagging below the spring line in any areas of the tunnels downstream from the weathered zones. Indeed, he testified that he did not observe that the appellant's forces departed from their normal drilling pattern to allow for an additional two inches of excavation below the spring line (Tr., p. 763), although he agreed that such fine shooting might be possible (Tr., p. 833). But, if this was possible, the Board is unable to perceive why a more discriminating practice could not have been followed. While the appellant's contention that, in the words of Dolan, "you couldn't tell from one shot to the next where you had to put steel and where you didn't have to put it" (Tr., p. 199), might have some force if the condition of the ground was constantly changing, the Board finds it impossible to understand why the appellant should have gone on allowing space for lagging in long stretches of the tunnels where it was never needed.³⁹ The Board finds, therefore, that the additional excavation that is the basis of the appellant's claim was wholly unnecessary.

The appellant was paid for such excavation as was necessary to provide space for the lagging in accordance with the specifications. Lagging was defined as a form of steel support by paragraph 52 of the specifications, and under paragraph 51 of the specifications the outside face of the lagging was the pay line for excavation below the spring line. As the lagging used in the tunnels consisted of steel channels

³⁹ In the power tunnel this was true for a distance of 690 feet, and in the outlet tunnel for a distance of 1,032 feet. Incidentally, the fact that no lagging was needed in such long reaches of the tunnels is only another indication that the appellant did not encounter difficult tunneling conditions downstream from the weathered zones.

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two inches in depth, the pay line was two inches outside the steel ribs where lagging was actually installed below the spring line, and the charge for overbreak was computed on the same basis. Where lagging was not installed, there was no basis for payment, or for refraining from making the overbreak charge. Thus, even if it had been wholly impractical to omit the space for lagging at those locations where no lagging actually had to be installed, this would have been only a requirement of the contract which the appellant had accepted. The fact that the Government inspectors may have been aware that the appellant was over-shooting does not enhance the merit or the appellant's claim.⁴⁰ It is rejected.

(b) *Claim for remission of overbreak utilized in widening of tunnels.* The Palisades contract included the construction of inclined inlet tunnels which were to intersect with the tunnels constructed under the Terteling contract. After the completion of the work under the Terteling contract, the Government made changes that required the enlargement of the intersecting areas. The result was that the Government was able to utilize 518.3 cubic yards of the overexcavation for which an overbreak charge had been made at the rate of \$20 a cubic yard. The appellant claims that this overbreak charge, which amounted to \$10,366, should be refunded, since once the Government had utilized the overexcavation, any necessity of filling the voids with concrete disappeared, and it would be inequitable to permit it to maintain the charge. As the appellant was also the subcontractor who constructed the inclined inlet tunnels, however, it received payment for enlargement of the tunnels at \$22 a cubic yard, and in making this payment the overexcavation performed under the Terteling contract was measured for payment under the Palisades contract.

In any event, whatever may be the equities of this situation, the overbreak charge was made strictly in accordance with the terms of the Terteling contract. The change that was made was under the Palisades rather than the Terteling contract, and hence in no way altered the terms of the latter contract. Nor did it affect in any way the quantity or characteristics of the work called for by that contract. Hence, no basis exists on which relief could be granted by the Board.

The Request for an Extension of Time

In its brief the appellant now contends that it is entitled to additional extensions of time of (1) at least 12 days by reason of the changed conditions that it encountered in the weathered zones; (2) 62 days by reason of the tunnel supports it had to provide in view of changed or misrepresented conditions; and (3) 51 days for the added

⁴⁰ *Paul C. Helmick Co.*, 63 I. D. 209, 235 (1956).

burden of removing the invert in winter weather, "which would not have been necessary except for the steel delay and changed conditions."⁴¹

The requests made in (1) and (2) must be rejected in view of the Board's findings and conclusions with respect to the claim of changed conditions or misrepresentations. In connection with (2), it should be noted additionally that, in so far as it rests on the use of cribbing rather than timber struts, one of the reasons why the appellant requested permission to use cribbing was its conviction that it would expedite the work. Moreover, when the Government decided not to insist on the removal of the cribbing, it effected a considerable saving of time for the appellant. It should be noted also that when in its letter of January 26, 1953, the appellant first requested an extension of time by reason of changed conditions it did not request an extension of time to take care of the timbering alleged to have been made necessary by changed conditions.⁴²

Only the request made in (3) rests partly upon an independent basis. Admittedly, the appellant was extremely slow in removing the invert, and performing the final cleanup of the tunnels.⁴³ It puts the blame, however, on freezing conditions in the tunnels resulting from winter weather. Its theory, in so far as not predicated upon the untenable ground that changed conditions were encountered, appears to be that the initial delay of 113 days in obtaining steel made it necessary that the work be performed partly in winter weather.

Actually, however, this delay gave the appellant a more favorable period of performance than it would have had if the delay had never occurred. The contractual period of performance would have run from December 17, 1951, to August 3, 1952. This would have meant that the appellant would have had not only to organize the job but also perform at least a good part of the tunnel excavation during the winter of 1951-52. As a result of the steel delay, however, the appellant obtained a period of performance that should have run from April 7 to November 25, 1952, and thus should have included no winter weather. At worst, the result of all the delays was that the appellant merely exchanged the winter weather of 1951-52 for the winter weather of 1952-53.

⁴¹ Appellant's Brief, p. 80. The requested extension of time in (2) and (3) represent considerable reductions from the requests made in the appellant's letter of July 8, 1954, in which 70 days was requested for (2) and 60 days for (3).

⁴² The tunnels had then been holed through and even the invert removal had commenced. While the appellant may not then have known perhaps the precise amount of timber which was involved, it must have known how much additional time had been involved in its installation. The fact that some of the timber might have to be removed was not necessarily a delaying factor. Dolan testified that this could be accomplished while other work was going on (Tr., p. 307).

⁴³ Dolan testified: "We spent ninety days or so here on what normally should have been a thirty to forty-five day operation" (Tr., p. 181). The appellant's rate of progress was at best, therefore, half of normal.

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It seems obvious, therefore, that the appellant to be entitled to a further extension of time must show either that it encountered "unusually severe weather" within the meaning of article 9 of the contract or that it encountered further delays due to other causes that were excusable. The record is devoid of any proof that the winter of 1951-52 was colder than the winter of 1952-53, or that any other kind of exceptionally bad weather was experienced by the appellant. As for other excusable causes of delay, the record shows clearly that far from being excusable, they were the fault of the appellant. These delays were connected, moreover, not only with the removal of the invert but with other phases of the performance of the contract.

Deficiencies of both personnel and equipment were responsible for the slow start of the appellant in excavating the tunnels. There was considerable delay in manning the drill crews fully for a three-shift operation.⁴⁴ The appellant's own General Superintendent characterized some of the miners whom it employed as mere "nippers" (Tr., p. 433).⁴⁵ The General Superintendent's health was, moreover, none too good and while this situation was in part remedied by the greater attention Dolan gave the job, it was nevertheless a factor in delaying the work. Of the various equipment deficiencies the most serious was one that Dolan attempted to pass off lightly as "the famous case of the Eimco mucker" (Tr., p. 162). This machine, which was used for mucking the tunnels, was wholly unsuitable for the job, and was finally replaced early in August 1952 by a yard and a half electric power shovel.⁴⁶ Although the inadequacy of the Eimco mucker was apparent almost from the beginning of its use, the appellant took at least four weeks in replacing it with the more suitable equipment.

The removal of the invert was bedevilled by the no less famous case of the slusher, a scraper type of excavator, used for mucking out the invert sections of the tunnels, but again the appellant experimented with it for several weeks before resorting to the use of a small shovel. In the cleanup of the tunnels the Bureau even came to the appellant's rescue by renting it a backhoe which was successfully used by the appellant for several days; the appellant also employed in addition, however, various pieces of its own equipment, including the Eimco mucker, a shovel and a dragline. More important, however, than the equipment difficulties was the fact that the appellant was very slow in shutting off the cold air from entering the tunnels and in pro-

⁴⁴ As late as July 9, 1952, the drill crews were still only half manned. Under this date, Ackerman wrote a letter to the appellant, complaining: "Up to the present time, you have had an average of seven or eight miners on each shift where fifteen are planned."

⁴⁵ Even more significant was this testimony of Williams: Q. Did you have experienced miners when you commenced the job? A. I had the best I could get, very reputable men. Q. But the best wasn't too good then? A. Probably not (Tr., p. 430).

⁴⁶ Even after the shovel was put in operation the appellant had a low voltage problem that was not solved satisfactorily for a considerable time.

viding adequate means of heating them. It was not until February 1953 that the appellant made use of tarpaulins to block off sections of the tunnels in which salamanders to melt the ice were placed. The delay, moreover, made it more difficult to thaw out the material that had already frozen. Dolan himself conceded that if the invert had been shot and mucked out promptly, the difficulties caused by the freezing of the materials could have been averted.

The appellant contends, to be sure, that while some difficulties were encountered in organizing and prosecuting the job, some degree of trial and error is inherent in an enterprise of any magnitude and complexity. Generally speaking, this is true, and the Board itself has recently emphasized that a contractor's normal difficulties are not to be exaggerated into derelictions.⁴⁷ Nevertheless, a contractor must surmount difficulties with reasonable promptness, particularly when a job is urgent and the time for its performance is limited, as it was in the present case. Weeks of experimentation—if not months of experimentation—are not excusable in the case of a job that is itself to be performed in months.⁴⁸ The request of the appellant for a further extension of time is denied.

CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Contract Appeals by the Secretary of the Interior (sec. 24, Order No. 2509, as amended; 19 F. R. 9428), the findings of fact and decisions of the contracting officer are affirmed.

WILLIAM SEAGLE, *Member*.

We concur:

THEODORE H. HAAS, *Chairman*.

HERBERT J. SLAUGHTER, *Member*.

⁴⁷ See *Caribbean Construction Corp.*, 64 I. D. 254, 271 (1957).

⁴⁸ There is no basis in the record for the contention of the appellant that it was delayed somewhat by the Bureau's setting of points, measuring overbreak, and checking steel installation. Even if this had interfered slightly with the appellant's operations, it was something which should have been expected by the appellant. There is equally no basis for the appellant's contention that the Government has controverted a stipulation by charging it with delays in the invert operation. The Government did not stipulate that "the cleanup work began the day following the completion of each of the tunnels" (Appellant's Reply Brief, p. 26). The stipulation was only to the effect that the invert operation extended between certain dates (see Tr., pp. 121-22).

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NOTE.—In the front of this volume are the following tables: (1) Decisions Reported; (2) Opinions Reported; (3) Decisions and Opinions by number; (4) Decisions and Opinions in chronological order; (5) Cases Cited; (6) Overruled and Modified Cases; (7) Statutes Cited: (A) Acts of Congress; (B) Revised Statutes; (C) United States Code; (8) Reorganization Plans Cited; (9) Executive Orders Cited; (10) Departmental Orders and Regulations Cited.

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During the period of 30 days allowed for the taking of an appeal from a contracting officer's decision, made pursuant to the "disputes" clause of the standard form Government contracts, the contracting officer may withdraw or change his decision; and, if he does so before an appeal has been taken, the running of the original period of 30 days is tolled, and a new period commences to run at such time as the contractor receives a copy of an amendatory or substitute decision. A communication from a contracting officer to a contractor, in order to amount to a decision that will start running the period for appeal, must, at least, be so worded as fairly and reasonably to inform the contractor that a determination under the "disputes" clause is intended.....

145

A contractor who claims that the contracting officer erred in denying a request for an extension of time, whether in whole or in part, has the burden of proving the existence of facts sufficient to support the granting of such extension of time, or of so much thereof as was denied by the contracting officer.....

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When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.....

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APPEALS—Continued

When there has been a failure to make provision in a contract for the assessment of liquidated damages, such damages may not be assessed against the contractor notwithstanding his failure to urge this as a ground for reversal. Such failure is not an example of "practical construction" of the contract by the parties, which has to do with interpretation of its terms during the period of performance.....

357

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.....

466

BIDS**Generally**

As the Comptroller General has held that the term "accompanying papers" in paragraph 5 (b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a pur-

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BIDS—Continued

Generally—Continued

chase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document...

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CHANGED CONDITIONS

Statements in the specifications of a standard form Government contract to the effect that Government-furnished information is not guaranteed, or that bidders are expected to inform themselves of all existing conditions, or that failure to estimate correctly the difficulties attending the execution of the work will not be a basis for relief, supplement the General Provisions of the contract, but do not supersede or override them, and do not preclude the allowance of extensions of time under the "changed conditions" clause in the event the contractor encounters conditions that fairly meet the standards prescribed by that clause...

145

A contractor who, in the course of performing a standard form Government contract for the demolition of an existing building, encounters hidden structural conditions of which the contractor was unaware at the time of submitting its bid is entitled, under the "changed conditions" clause, to an extension of time on account of delays caused by such structural conditions, if their presence was not disclosed by any of the drawings furnished the contractor by the Government, would not have been revealed by an inspection of the scope which a prudent bidder could reasonably have

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CHANGED CONDITIONS—Continued

been expected to make in advance of submitting its bid, and was not a feature usually found in a building of the type to be demolished.....

145

Where a delay in the performance of the contract work is caused in part by excusable circumstances, such as the encountering of a "changed condition," and in part by inexcusable circumstances, such as a failure by the contractor to make adequate provision for overcoming known or expectable difficulties, an extension of time may be granted for so much of the total period of delay as fairly approximates the amount of time lost by reason of the excusable circumstances, even though the time so lost is not susceptible of precise determination because of the concurrent nature of the various causes of delay.....

146

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated

CONTRACTS—Continued

CHANGED CONDITIONS—Continued
field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation-----

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shoreline where a seawall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to constitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in

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CHANGED CONDITIONS—Continued
work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there was also a "change" in the scope of the work-----

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A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a seawall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the Government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract-----

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CHANGED CONDITIONS—Continued

Under a contract for the alteration of a diversion dam and the enlargement of a canal, the claim of a contractor for compensation to cover the cost of providing added protection for the dam as a result of the closing by the Government of the headworks of the canal in order to control an earth slide which occurred at a time when the contractor, with the permission of the Government, was using the canal for diversion purposes, cannot be allowed under either the "changes" or "changed conditions" clause of the contract. By permitting the contractor to proceed with such water control plan the Government did not warrant that the canal would remain open even if repairs were required because of an accidental earth slide into the canal. A provision of the specifications that the contractor was to pass 800 cfs of water through the canal, after the end of the time allowed for its enlargement, did not create a duty on the part of the Government to allow the contractor, under all circumstances, to pass that amount of water through the canal.-----

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A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by flood waters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be

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CHANGED CONDITIONS—Continued

allowed under the "changed conditions" article of the contract-----

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A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause-----

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When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to

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CHANGED CONDITIONS—Continued
have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed...

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A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual pre-bid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation.....

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CHANGED CONDITIONS—Continued

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.....

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CHANGES AND EXTRAS

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and riprap merely because the Government changed the design prior to the advertisement for bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from

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CHANGES AND EXTRAS—Continued

the drawings and specifications is immaterial if the degree of uncertainty was not appreciable.

97

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation.

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The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the

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CHANGES AND EXTRAS—Continued

item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficulties encountered in finishing the subgrade when such difficulties were due to its own haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause, and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not maintain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract

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resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.....

185

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shoreline where a seawall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to constitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there

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was also a "change" in the scope of the work.....

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A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a seawall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the Government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract.....

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Under a contract for the alteration of a diversion dam and the enlargement of a canal, the claim of a contractor for compensation to cover the cost of

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providing added protection for the dam as a result of the closing by the Government of the headworks of the canal in order to control an earth slide which occurred at a time when the contractor, with the permission of the Government, was using the canal for diversion purposes, cannot be allowed under either the "changes" or "changed conditions" clause of the contract. By permitting the contractor to proceed with such water control plan the Government did not warrant that the canal would remain open even if repairs were required because of an accidental earth slide into the canal. A provision of the specifications that the contractor was to pass 800 cfs of water through the canal, after the end of the time allowed for its enlargement, did not create a duty on the part of the Government to allow the contractor, under all circumstances, to pass that amount of water through the canal.

285

A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by flood waters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be allowed under the "changed conditions" article of the contract.

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A claim for additional compensation on the ground that

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the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

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A claim of a clearing contractor for additional compensation because of a shortage of marketable materials, which it had a right to dispose of under the terms of the contract, may be allowed under the "changes" article of the standard form of Government construction contract when the shortage was due to conduct of the Government that reduced the quantum of the clearing work to be done by the contractor. The contractor, however, would not be entitled to additional compensation if such missing materials were not within the scope of the clearing work to be done under the contract, or were removed

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without the sanction of the Government after the passing of title to the contractor....

388

When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.....

440

A claim made by a tunneling contractor for remission of an overbreak charge because a certain yardage of the overexcavation was utilized in enlarging areas of the tunnels that intersected with a tunnel constructed under another contract must be rejected, since whatever change was involved was made under another contract, and did not in any way affect the quantity or characteristics of the work called for under the contract under which the claimant contractor operated, and the overbreak charge was made strictly in accordance with the terms of that contract.....

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COMPTROLLER GENERAL

When a contracting officer withheld from payments due under a contract sums to cover contingent liabilities of a contractor by reason of alleged

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COMPTROLLER GENERAL—Continued
labor violations being investigated by him and by the Department of Labor, but made no findings of fact with respect to the alleged labor violations and merely informed the contractor that the matter was being referred to the Comptroller General, and when the contractor never requested the contracting officer to make findings of fact with respect to the alleged labor violations and did not complain of the withholding in its notice of appeal, but only in a subsequent brief, neither the issue of the alleged labor violations nor the propriety of the withholding is properly before the Board of Contract Appeals. The submission of the matter to the Comptroller General did not constitute a finding of fact or decision within the meaning of the "disputes" article of the contract, or of the regulations of the Board.....

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As the Comptroller General has held that the term "accompanying papers" in paragraph 5 (b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the con-

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COMPTROLLER GENERAL—Continued
tractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document.-----

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CONTRACTING OFFICER

During the period of 30 days allowed for the taking of an appeal from a contracting officer's decision, made pursuant to the "disputes" clause of the standard form Government contracts, the contracting officer may withdraw or change his decision; and, if he does so before an appeal has been taken, the running of the original period of 30 days is tolled, and a new period commences to run at such time as the contractor receives a copy of an amendatory or substitute decision. A communication from a contracting officer to a contractor, in order to amount to a decision that will start running the period for appeal, must, at least, be so worded as fairly and reasonably to inform the contractor that a determination under the "disputes" clause is intended.-----

145

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.-----

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Under the "disputes" clause of the standard-form Government construction contracts,

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CONTRACTING OFFICER—Continued
the contracting officer has the responsibility of apprising the contractor of the basis for his decision, and under the "delays-damages" clause, he has the further responsibility of making findings of fact with respect to the circumstances and extent of alleged excusable causes of delay.-----

449

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.-----

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DAMAGES**Liquidated Damages**

As the Comptroller General has held that the term "accompanying papers" in paragraph 5 (b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the pur-

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Liquidated Damages—Con.

chase order must be regarded as an extraneous and unilaterally issued document.-----

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When there has been a failure to make provision in a contract for the assessment of liquidated damages, such damages may not be assessed against the contractor notwithstanding his failure to urge this as a ground for reversal. Such failure is not an example of "practical construction" of the contract by the parties, which has to do with interpretation of its terms during the period of performance.-----

357

When from the reported circumstances in documents in the appeal file, it may be inferred that two hurricanes, each of which lasted approximately 1 day, caused difficulties that delayed the work by approximately 2 days in the aggregate, such delay was excusable and the contractor is entitled to an extension of the time for performance of 2 days.-----

440

Failure by a contractor to prosecute the contract work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the contractor to extensions of time for such parts of the ultimate delay in completion as are attributable to events, such as acts of the Government or strikes, that are excusable under the terms of the contract.-----

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A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the

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DAMAGES—Continued

Liquidated Damages—Con.

tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor.-----

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Unliquidated Damages

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the contractor within the meaning of the "delays-damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does

CONTRACTS—Continued

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Unliquidated Damages—Con.

not necessarily depend on a determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.

The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficul-

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ties encountered in finishing the subgrade when such difficulties were due to its own haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause, and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not maintain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.

A claim of a contractor for costs incurred during a shutdown allegedly due to Government regulation of storage and diversion upstream from a dam, in violation of an express or implied agreement of the Government, is based on a breach of contract, and may not be administratively determined.

A claim of a contractor for damages for delay in its work and additional expense, allegedly due to the violation by the Government of express or

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DAMAGES—Continued**Unliquidated Damages—Con.**

implied obligations of cooperation, is based on a breach of contract, and may not be administratively determined.-----

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A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.-----

376

A claim of a clearing contractor for additional compensation because of increased costs of performance, and because of a reduction in the sales price of improvements disposable by the contractor under the terms of the contract, which resulted from delays by the Government in furnishing possession of such improvements is based on a breach of contract, and may

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DAMAGES—Continued**Unliquidated Damages—Con.**

not be administratively determined.-----

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A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.-----

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DELAYS OF CONTRACTOR

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the contractor within the meaning of the "delays-damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does not necessarily depend on a determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not

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DELAYS OF CONTRACTOR—Con.

necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.

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A delay in the performance of the contract work caused by the contractor's failure to provide enough foremen or workmen with the requisite amount of "know-how" to complete the job within the time specified in the contract is not excusable, for it is the contractor's responsibility to solve the technical problems incident to the performance of the contract work, even though they may be of a novel character, and to provide competent employees in sufficient numbers to complete the job, barring unforeseeable conditions or events, within the specified time.

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Where a delay in the performance of the contract work is caused in part by excusable circumstances, such as the encountering of a "changed condition," and in part by inexcusable circumstances, such as a failure by the contractor to make adequate provision for overcoming known or expectable difficulties, an extension of time may be granted for so much of the total period of delay as fairly approximates the amount of time lost by reason of the excusable circumstances, even though the time so lost is not susceptible of precise determination because of the concurrent nature of the various causes of delay.

146

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove

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DELAYS OF CONTRACTOR—Con.

the tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor.

467

DELAYS OF GOVERNMENT

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative

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DELAYS OF GOVERNMENT—Con.

officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause-----

376

A claim of a clearing contractor for additional compensation because of increased costs of performance, and because of a reduction in the sales price of improvements disposable by the contractor under the terms of the contract, which resulted from delays by the Government in furnishing possession of such improvements is based on a breach of contract, and may not be administratively determined-----

388

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the tunnel invert in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor---

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DRAWINGS

A claim for additional compensation made by a tunneling contractor on the ground that

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DRAWINGS—Continued

it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation...

466

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been

CONTRACTS—Continued

DRAWINGS—Continued

generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual pre-bid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation.

466

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.

466

INTERPRETATION

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and riprap merely because the Government changed the design prior to the advertisement for bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied

CONTRACTS—Continued

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INTERPRETATION—Continued

by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from the drawings and specifications is immaterial if the degree of uncertainty was not appreciable.

97

Statements in the specifications of a standard form Government contract to the effect that Government-furnished information is not guaranteed, or that bidders are expected to inform themselves of all existing conditions, or that failure to estimate correctly the difficulties attending the execution of the work will not be a basis for relief, supplement the General Provisions of the contract, but do not supersede or override them, and do not preclude the allowance of extensions of time under the "changed conditions" clause in the event the contractor encounters conditions that fairly meet the standards prescribed by that clause.

145

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shoreline where a seawall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to con-

CONTRACTS—Continued

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INTERPRETATION—Continued

stitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there was also a "change" in the scope of the work.-----

254

A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a seawall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a

INTERPRETATION—Continued

spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the Government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract.-----

254

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.-----

254

Under a contract for the alteration of a diversion dam and the enlargement of a canal, the claim of a contractor for compensation to cover the cost of providing added protection for the dam as a result of the closing by the Government of the headworks of the canal in order to control an earth slide which occurred at a time when the contractor, with the permission of the Government, was using the canal for diversion purposes, cannot be allowed under either the

CONTRACTS—Continued

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INTERPRETATION—Continued

"changes" or "changed conditions" clause of the contract. By permitting the contractor to proceed with such water control plan the Government did not warrant that the canal would remain open even if repairs were required because of an accidental earth slide into the canal. A provision of the specifications that the contractor was to pass 800 cfs of water through the canal, after the end of the time allowed for its enlargement, did not create a duty on the part of the Government to allow the contractor, under all circumstances, to pass that amount of water through the canal.-----

285

A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by floodwaters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be allowed under the "changed conditions" article of the contract.-----

312

As the Comptroller General has held that the term "accompanying papers" in paragraph 5 (b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Gov-

CONTRACTS—Continued

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INTERPRETATION—Continued

ernment may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document.-----

357

When there has been a failure to make provision in a contract for the assessment of liquidated damages, such damages may not be assessed against the contractor notwithstanding his failure to urge this as a ground for reversal. Such failure is not an example of "practical construction" of the contract by the parties, which has to do with interpretation of its terms during the period of performance.-----

357

Acceptance by a contractor of a change order which stipulates that no increase in the contract performance time will be allowed "on account of the performance" of the work described in the order does not bar the allowance of an extension of time on account of delays caused by the action of the Government in holding up the job while the advisability of ordering such a change was being considered.-----

449

NOTICES

The Board of Contract Appeals will not reject a claim for an extension of the perform-

CONTRACTS—Continued**NOTICES—Continued**

ance time of a contract because of want of proof that the contractor has complied with an applicable notice requirement of the contract if such requirement is one that is subject to waiver, and if no authorized representative of the Government has asserted that the contractor failed to give timely notice or has asked that compliance with the notice requirement be proved by the contractor-----

145

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal-----

254

PAYMENTS

When a contracting officer withheld from payments due under a contract sums to cover contingent liabilities of a contractor by reason of alleged labor violations being investigated by him and by the Department of Labor, but made no findings of fact with respect to the alleged labor violations and merely informed the contractor that the matter was being referred to the Comptroller General, and when the contractor never requested the contracting officer to make findings of fact with respect to the alleged labor violations and did not complain of the withholding in its notice of appeal, but only in a subse-

CONTRACTS—Continued

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PAYMENTS—Continued

quent brief, neither the issue of the alleged labor violations nor the propriety of the withholding is properly before the Board of Contract Appeals. The submission of the matter to the Comptroller General did not constitute a finding of fact or decision within the meaning of the "disputes" article of the contract, or of the regulations of the Board-----

38

PERFORMANCE

The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficulties encountered in finishing the subgrade when such difficulties were due to its own

CONTRACTS—Continued

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PERFORMANCE—Continued

haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause; and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not maintain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.

185

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden of proving that the contractor was negligent rests on the Government in such circum-

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PERFORMANCE—Continued

stances, and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence when, having completed a wasteway structure, he failed to place the backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.

312

The question whether a contractor who was engaged in the rehabilitation of an existing irrigation system may be required to repair storm damage to the work outside the pay or neat lines of the contract depends in large part upon whether the contractor was negligent in its operations prior to the occurrence of the storm. Although under the terms of the contract the contractor was required to repair the storm damage irrespective of fault on its part, this obligation would be limited to the restoration of the work it had undertaken under the contract. On the other hand, if the contractor were guilty of negligence in the conduct of its operations prior to the storm, it would be obligated to repair

CONTRACTS—Continued

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PERFORMANCE—Continued

any damage attributable to its negligence, whether within or without the pay or neat lines. However, even though the contractor were not negligent, the scope of its obligation to repair storm damage would not be so narrow that it could not be required to do any work that was outside the pay or neat lines, nor so wide that it could be required to restore any property of the Government that may have been damaged by the storm. Thus, the contractor, who was required to make an opening through an embankment, was not obligated to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work.....

312

A contractor engaged in rehabilitating an existing irrigation system should expect that some maintenance work and even minor construction work will be performed during the construction period of the contract, and the fact that such work was performed does not excuse the contractor from repairing damage caused by flood waters resulting from an unusually heavy rainstorm. This is especially so when the contractor has failed to show that there was a causal connection between such work and the damage to the contractor's work.....

312

In order to permit inspection of damage caused by a flood resulting from an unusually heavy rainstorm a contractor could be required to dewater a headworks structure inundated by the flood waters when the contract provided

CONTRACTS—Continued

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PERFORMANCE—Continued

that the contractor was to provide without cost to the Government reasonable facilities for the inspection of the work.....

312

A claim for additional compensation made by a tunneling contractor on the ground that it was compelled to excavate two inches below the spring lines of the tunnels throughout their lengths in order to provide space for installing steel lagging outside the steel ribs must be rejected when the contractor was paid, in accordance with the provisions of the specifications, for such additional excavation in the reaches of the tunnels as was necessary to permit the installation of steel lagging, and the installation of steel lagging was wholly unnecessary in other long reaches of the tunnels.....

466

RELEASE

Acceptance by a contractor of a change order which stipulates that no increase in the contract performance time will be allowed "on account of the performance" of the work described in the order does not bar the allowance of an extension of time on account of delays caused by the action of the Government in holding up the job while the advisability of ordering such a change was being considered.....

449

SPECIFICATIONS

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and rip-rap merely because the Government changed the design prior to the advertisement for

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SPECIFICATIONS—Continued

bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from the drawings and specifications is immaterial if the degree of uncertainty was not appreciable. 97

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation. 185

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SPECIFICATIONS—Continued

The question whether a contractor who was engaged in the rehabilitation of an existing irrigation system may be required to repair storm damage to the work outside the pay or neat lines of the contract depends in large part upon whether the contractor was negligent in its operations prior to the occurrence of the storm. Although under the terms of the contract the contractor was required to repair the storm damage irrespective of fault on its part, this obligation would be limited to the restoration of the work it had undertaken under the contract. On the other hand, if the contractor were guilty of negligence in the conduct of its operations prior to the storm, it would be obligated to repair any damage attributable to its negligence, whether within or without the pay or neat lines. However, even though the contractor were not negligent, the scope of its obligation to repair storm damage would not be so narrow that it could not be required to do any work that was outside the pay or neat lines, nor so wide that it could be required to restore any property of the Government that may have been damaged by the storm. Thus, the contractor, who was required to make an opening through an embankment, was not obligated to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work. 312

A claim made by a tunneling contractor for remission of an overbreak charge because a

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SPECIFICATIONS—Continued

certain yardage of the over-excavation was utilized in enlarging areas of the tunnels that intersected with a tunnel constructed under another contract must be rejected, since whatever change was involved was made under another contract, and did not in any way affect the quantity or characteristics of the work called for under the contract under which the claimant contractor operated, and the overbreak charge was made strictly in accordance with the terms of that contract-----

A claim for additional compensation made by a tunneling contractor on the ground that it was compelled to excavate two inches below the spring lines of the tunnels throughout their lengths in order to provide space for installing steel lagging outside the steel ribs must be rejected when the contractor was paid, in accordance with the provisions of the specifications, for such additional excavation in the reaches of the tunnels as was necessary to permit the installation of steel lagging, and the installation of steel lagging was wholly unnecessary in other long reaches of the tunnels-----

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or

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SPECIFICATIONS—Continued

exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual prebid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation-----

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material

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SPECIFICATIONS—Continued

encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.-----

SUBCONTRACTORS AND SUPPLIERS

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden of proving that the contractor was negligent rests on the Government in such circumstances, and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence

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SUBCONTRACTORS AND SUPPLIERS—Continued

when, having completed a wasteway structure, he failed to place the backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.-----

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466

SUBSTANTIAL EVIDENCE

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden of proving that the contractor was negligent rests on the Government in such circumstances, and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence when, having completed a wasteway structure, he failed to place the

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SUBSTANTIAL EVIDENCE—Continued
backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.

312

When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.

440

SUSPENSION AND TERMINATION

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspen-

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SUSPENSION AND TERMINATION—Continued

sion." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

376

When a contractor breaches a contractual guaranty, by failing to remedy faulty materials or workmanship within 1 year following the Government's final acceptance of the work, the contracting officer, under the standard form of Government construction contract, is entitled to terminate the contractor's right to proceed, to have the necessary repairs made, and to assess their cost against the contractor.

440

UNFORESEEABLE CAUSES

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the contractor within the meaning of the "delays-damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does not necessarily depend on a

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UNFORESEEABLE CAUSES—Continued
determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.....

38

Where a delay in the performance of the contract work is caused in part by excusable circumstances, such as the encountering of a "changed condition," and in part by inexcusable circumstances, such as a failure by the contractor to make adequate provision for overcoming known or expectable difficulties, an extension of time may be granted for so much of the total period of delay as fairly approximates the amount of time lost by reason of the excusable circumstances, even though the time so lost is not susceptible of precise determination because of the concurrent nature of the various causes of delay.....

146

Compliance with contractual provisions requiring that the contractor exercise a high degree of care for the safety of historic buildings, users of public streets, and persons and property generally in the vicinity of the site of the contract work, and observe municipal restrictions upon the manner in which the contract work may be done, is not in and of itself an excusable cause of delay.....

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UNFORESEEABLE CAUSES—Continued

A contractor who claims that the contracting officer erred in denying a request for an extension of time, whether in whole or in part, has the burden of proving the existence of facts sufficient to support the granting of such extension of time, or of so much thereof as was denied by the contracting officer.....

146

The term "unusually severe weather" in the "excusable causes of delay" paragraph of the standard form Government contracts means only weather surpassing in severity that usually encountered or reasonably to be expected in the particular locality during the time of year involved.....

146

When from the reported circumstances in documents in the appeal file, it may be inferred that two hurricanes, each of which lasted approximately 1 day, caused difficulties that delayed the work by approximately 2 days in the aggregate, such delay was excusable and the contractor is entitled to an extension of the time for performance of 2 days.....

440

Under the "disputes" clause of the standard-form Government construction contracts, the contracting officer has the responsibility of apprising the contractor of the basis for his decision, and under the "delays-damages" clause, he has the further responsibility of making findings of fact with respect to the circumstances and extent of alleged excusable causes of delay.....

449

The presence in a contract of specifications that necessitate reference to the catalogs of various dealers in order to identify the types, styles and sizes of required articles con-

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UNFORESEEABLE CAUSES—Con.

stitutes an excusable cause of delay if the specifications are ambiguous, by reason of such circumstances as the use by a named dealer of the same number to designate different articles in different catalogs, but not if the specifications are unambiguous-----

449

Delays in the completion of a building caused by the issuance of Government purchase orders that necessitate deferment of completion of the building until the articles specified in the orders can be procured and installed are excusable-----

449

The issuance by authorized Government personnel of instructions or requests that progress of the contract work be held up while consideration is being given to the advisability of making changes in the specifications constitutes an excusable cause of delay---

449

Failure by a contractor to prosecute the contract work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the contractor to extensions of time for such parts of the ultimate delay in completion as are attributable to events, such as acts of the Government or strikes, that are excusable under the terms of the contract-----

449

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually

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UNFORESEEABLE CAUSES—Con.

gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor-----

467

WAIVER AND ESTOPPEL

The Board of Contract Appeals will not reject a claim for an extension of the performance time of a contract because of want of proof that the contractor has complied with an applicable notice requirement of the contract if such requirement is one that is subject to waiver, and if no authorized representative of the Government has asserted that the contractor failed to give timely notice or has asked that compliance with the notice requirement be proved by the contractor-----

145

CONVEYANCES**GENERALLY**

Where through a mutual mistake of the parties a tract of land in a conveyance is incorrectly described, in equity the grant will be held effective as to the tract which the parties intended to convey----

327

DESERT LAND ENTRY**CLASSIFICATION**

It is proper to refuse to classify lands for desert land entry where it is shown that

DESERT LAND ENTRY—Con.	Page	GRAZING PERMITS AND LICENSES	Page
CLASSIFICATION—Con.		ADJUDICATION	
the soil and topography of the lands applied for are such that the lands are unfit for cultivation.....	137	Although a range manager's decision on an application for grazing privileges may satisfy the requirements for a notice of hearing under the Administrative Procedure Act, such a decision does not constitute a notice of hearing under the Administrative Procedure Act and a hearing which is held on the applicant's appeal from the range manager's decision is not in violation of the Administrative Procedure Act because the decision does not conform to the requirements for a notice of hearing imposed by the Administrative Procedure Act.....	232
It is proper to refuse to classify lands for desert land entry where it is shown that the applicants intend to rely on percolating water for the irrigation of the lands and where it is shown further that there is no percolating water in the groundwater basin surplus to the needs of the private landowners in the basin.....	137	Where subsequent to a decision of a hearing examiner a provision of the Federal Range Code relating to the method of computing the dependency by use or priority to be attached to base property is amended to provide a more liberal formula than that permitted under the terms of the previous code, the amended provision should be applied in adjudicating the future grazing privileges of an applicant for grazing rights.....	290
WATER RIGHT		APPEALS	
Although the California law is not clear as to the rights of desert land entrymen to the use of percolating water underlying the entered land, there is sufficient support for the position that desert land entrymen do have appropriative rights and that such rights satisfy the requirements of the Desert Land Act so that the Department will not reject applications for desert land entry as a matter of law for the reason that the applicants intend to use percolating water for the reclamation of the entries.....	57	Where a grazing applicant appeals to a hearing examiner from a decision of the range manager partially rejecting his application, the burden is upon the applicant to show by substantial evidence that the adjudication was improper.....	232
FEDERAL EMPLOYEES AND OFFICERS		BASE PROPERTY (LAND)	
INTEREST IN LANDS		Dependency by Use	
The fact that a United States deputy mineral surveyor performed the work of locating a claim for a patent applicant does not, in the absence of evidence that at the time of location the surveyor had, or has since acquired, an interest in the land, make the location void by reason of section 452 of the Revised Statutes which prohibits the purchase or acquisition of interests in the purchase of public lands by officers, clerks, and employees of the General Land Office.....	337	Where the dependency by use of base property is determined on the basis of the record of forest permits issued to the applicant's predecessors	

GRAZING PERMITS AND LI- CENSES—Continued

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BASE PROPERTY (LAND)—Continued

Dependency by Use—Con.

and the applicant shows that permits for additional livestock from the same base may have been overlooked but the evidence in the record is inconclusive, the case will be remanded for a redetermination of the priority of the base property-----

290

FEDERAL RANGE CODE

Where subsequent to a decision of a hearing examiner a provision of the Federal Range Code relating to the method of computing the dependency by use or priority to be attached to base property is amended to provide a more liberal formula than that permitted under the terms of the previous code, the amended provision should be applied in adjudicating the future grazing privileges of an applicant for grazing rights-----

290

HEARINGS

In an administrative proceeding, the strict common law rules of evidence do not apply and the fact that hearsay evidence is admitted will afford no basis for ordering a new hearing-----

233

Although it has been held that under section 7 (c) of the Administrative Procedure Act, an administrative finding cannot be based upon hearsay alone or hearsay corroborated only by a scintilla of evidence, it is questionable whether this principle applies to hearings in grazing cases in view of the fact that the hearings are held only on appeals and the appellant has the burden of proof-----

233

Where the record shows that a grazing applicant knew prior

GRAZING PERMITS AND LI- CENSES—Continued

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HEARINGS—Continued

to the time of the hearing on his appeal the precise issues involved in the hearing, he cannot later claim that he was not given proper notice of the issues involved in the hearing.-

232

In view of section 18 of the Taylor Grazing Act, which provides that local advisory boards shall give advice and recommendations on grazing applications, it seems certain that range managers may base their decisions largely or entirely upon hearsay or other evidence which would not be competent or admissible in court proceedings-----

232

Since the burden is upon an applicant for grazing privileges who appeals from the rejection of his application to show by substantial probative evidence that the rejection was improper, it is unnecessary to examine the Bureau's evidence on the issues involved if the appellant's evidence does not sustain his burden-----

232

The official grazing files are public records of which the Department takes notice in rendering decisions but the probative value of the files depends upon the contents of the files-----

232

SPECIAL DISTRICT RULES

The provisions of section 4 of the Administrative Procedure Act relating to rule making do not apply to a special rule issued under the Federal Range Code and applicable to the range in a particular district because the rule involves use of the Federal range which is public property, and matters relating to public property are expressly excepted from

**GRAZING PERMITS AND LI-
CENSES—Continued**

SPECIAL DISTRICT RULES—Continued
the provisions governing rule making in section 4 of the Administrative Procedure Act.

423

The Federal Range Code provides that where local conditions in a district make necessary the adoption of a special rule on any of the matters in the range code, such a rule may be adopted for a particular district, and where a special rule is adopted which provides that a different priority period shall be used than the period provided in the code, and there are persuasive reasons in support of the adoption of such a rule, the award of grazing privileges in the district may be made in accordance with the special rule, there being no statutory requirement that any priority period be used in determining preferences in the issuance of grazing permits.

423

INDIAN LANDS

DESCENT AND DISTRIBUTION

Generally

The State courts of Oklahoma are without authority to administer on the restricted estates of deceased Indians of the Five Civilized Tribes, and such courts are likewise without authority to consider and allow claims against the distributive shares of Indian heirs which are restricted by the act of August 4, 1947 (61 Stat. 731).

17

The property comprising the restricted estate of a Five Tribes Indian decedent continues restricted and subject to the jurisdiction of the Secretary of the Interior only so long as belonging to Indian heirs of one-half or more Indian blood computed from the final rolls of the Five Civilized

INDIAN LANDS—Continued

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DESCENT AND DISTRIBUTION—Con.

Generally—Continued

Tribes pursuant to the act of August 4, 1947 (61 Stat. 731).

280

Intestate Succession

The doctrine of ancestral descent is not applicable to an adult Indian estate under Oregon statutory laws.

401

Presumption of Death

An Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed dead. (25 CFR 81.20.) At common law and under the statutes of Oregon, a person is presumed to be dead after an unexplained absence of 7 years.

401

To determine death to have occurred at an earlier date than 7 years, evidence must show facts or circumstances which would establish that it was at an earlier date. If a precise period as to time of death must be established, it must be done so by evidence of such character as to make it probable that he died at the particular time.

401

Wills

The Oklahoma law of wills applies in the case of restricted estates of deceased Indians of the Five Civilized Tribes in all particulars save as modified by the proviso contained in section 23 of the act of April 26, 1906 (34 Stat. 137), as amended.

17

The will of a deceased Indian of the Five Civilized Tribes which was acknowledged and approved as required by section 23 of the act of April 26, 1906 (34 Stat. 137), as amended, can effectively devise restricted lands without regard to any limiting provisions of

INDIAN LANDS—Continued

DESCENT AND DISTRIBUTION—Con.

Wills—Continued

the Oklahoma law, but such will cannot effectively disinherit a surviving spouse with respect to other types and classes of property.-----

The authority of the Secretary of the Interior to approve an Indian's testamentary disposition of restricted property under 25 U. S. C. sec. 373 is not limited by the law of the State or by an agreement for the division of the estate which is entered into by persons claiming an interest therein.-----

In making a per capita distribution of tribal funds under the act of August 9, 1955 (69 Stat. 559), which calls for distribution to the "heirs or devisees" of deceased members of the tribe, it is proper to distribute the funds to a general residuary legatee. (*Solicitor's opinion of May 2, 1944, 58 I. D. 680, distinguished.*)-----

An appeal from a decision of an Examiner of Inheritance which denied a petition for rehearing, after a determination of heirs and approval of a will, may be withdrawn by the appellants in aid of a settlement whereby distribution of the estate is to be made in a manner other than by the terms of the will.-----

INDIVIDUAL RIGHTS IN TRIBAL PROPERTY

Annuity and Per Capita Payments

In making a per capita distribution of tribal funds under the act of August 9, 1955 (69 Stat. 559), which calls for distribution to the "heirs or devisees" of deceased members of the tribe, it is proper to distribute the funds to a general residuary legatee. (*So-*

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INDIAN LANDS—Continued

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INDIVIDUAL RIGHTS IN TRIBAL PROPERTY—Continued

Annuity and Per Capita Payments—Continued

licitor's opinion of May 2, 1944, 58 I. D. 680, distinguished.)-----

LEASES AND PERMITS

Oil and Gas

Where an Indian tribal oil and gas lease provides for a term of ten years and as much longer thereafter as oil and/or gas is produced in paying quantities, upon failure of production after the primary period the lease terminates by its own terms.-----

Neither the payment of advance rentals nor their receipt by departmental officials upon a lease which had terminated can continue or reinstate the lease.-----

Under an Indian tribal oil and gas lease which provided as a condition to its existence that oil and gas be produced in paying quantities, upon a cessation of production no authority is vested in the Secretary of the Interior to allow a suspension of operations and thereby continue the term of the lease.-----

RIGHTS-OF-WAY

The act of February 5, 1948 (62 Stat. 17; 25 U. S. C. sec. 323), providing for "rights-of-way for all purposes" over and across Indian lands applies to sites for all features and facilities, including dams, reservoirs, powerplants, and construction and operating camps, appropriate to water control projects undertaken by the United States.-----

TIMBER

Where a contract for the sale of Indian timber, pursuant to either sections 7 or 8

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INDIAN LANDS—Continued

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TIMBER—Continued

of the act of June 25, 1910 (36 Stat. 857; 25 U. S. C. secs. 406 or 407), is supported by adequate consideration, no new consideration is required to support a change in price or ratio pursuant to a redetermination of price or ratio clause contained in the contract. Consideration adequate for the original contract is sufficient to support several distinct stipulations by either party to do, or refrain from doing, further acts.....

305

Contracts for the sale of timber on any Indian allotment or on unallotted tribal lands pursuant to sections 7 and 8 of the act of June 25, 1910 (36 Stat. 857; 25 U. S. C. secs. 406 and 407), are not public contracts so as to be subject to all the special laws pertaining to such contracts..

305

Where a contract for the sale of Indian timber authorizes the Secretary to redetermine stumpage prices upon a finding of changed conditions, the Secretary has broad discretion to consider those factors and use those tests and methods of valuation which a capable and prudent businessman would use.....

305

TRIBAL LANDS

Alienation

An Executive Order reservation withdrawal from the public domain "For the Ozette Indians not now residing upon any Indian reservation" may be revoked if in fact there are no longer any living Indians identifiable as members of the Ozette Tribe. In such case, the equitable estates merge in the United States and the trust is terminated.....

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INDIAN TRIBES

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MEMBERSHIP

The authority of the Commission to the Five Civilized Tribes and of the Secretary of the Interior to strike names from the rolls of the Five Civilized Tribes, after notice and an opportunity to be heard, continued to March 4, 1907, when the rolls were closed.....

280

The fact that an heir who was enrolled with the Creek Tribe of the Five Civilized Tribes had received an allotment of land with another tribe of Indians justified action by the Commission to the Five Civilized Tribes and the Secretary of the Interior striking the heir's name from the Creek roll, which action was final after the passage of the act of April 26, 1906 (34 Stat. 137)...

280

PARTICULAR TRIBES

Five Civilized Tribes

The authority of the Commission to the Five Civilized Tribes and of the Secretary of the Interior to strike names from the rolls of the Five Civilized Tribes, after notice and an opportunity to be heard, continued to March 4, 1907, when the rolls were closed.....

280

The fact that an heir who was enrolled with the Creek Tribe of the Five Civilized Tribes had received an allotment of land with another tribe of Indians justified action by the Commission to the Five Civilized Tribes and the Secretary of the Interior striking the heir's name from the Creek roll, which action was final after the passage of the act of April 26, 1906 (34 Stat. 137)...

280

The property comprising the restricted estate of a Five Tribes Indian decedent con-

INDIAN TRIBES—Continued**PARTICULAR TRIBES—Continued****Five Civilized Tribes—Con.**

tinues restricted and subject to the jurisdiction of the Secretary of the Interior only so long as belonging to Indian heirs of one-half or more Indian blood computed from the final rolls of the Five Civilized Tribes pursuant to the act of August 4, 1947 (61 Stat. 731).

280

RESERVATIONS

Descendents of Ozette Indians who abandoned the reservation relinquished all rights thereon when they did not return to cast their votes to determine the future of the reservation lands when the election was held in 1935. It is believed that all those persons desiring to preserve a tribal relationship cast their votes in similar elections as residents of other reservations.

435

The mere fact that the Ozettes were historically a branch or part of the Makah Tribe does not give the Makah Tribe any rights to the Ozette reservation.

435

INDIANS**CONTRACTS**

Where a contract for the sale of Indian timber, pursuant to either sections 7 or 8 of the act of June 25, 1910 (36 Stat. 857; 25 U. S. C. secs. 406 or 407), is supported by adequate consideration, no new consideration is required to support a change in price or ratio pursuant to a redetermination of price or ratio clause contained in the contract. Consideration adequate for the original contract is sufficient to support several distinct stipulations by either party to do, or refrain from doing, further acts.

305

Where a contract for the sale of Indian timber author-

INDIANS—Continued

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CONTRACTS—Continued

izes the Secretary to redetermine stumpage prices upon a finding of changed conditions, the Secretary has broad discretion to consider those factors and use those tests and methods of valuation which a capable and prudent businessman would use.

305

Contracts for the sale of timber on any Indian allotment or on unallotted tribal lands pursuant to sections 7 and 8 of the act of June 25, 1910 (36 Stat. 857; 25 U. S. C. secs. 406 and 407), are not public contracts so as to be subject to all the special laws pertaining to such contracts.

305

MINING CLAIMS**GENERALLY**

If a deputy mineral surveyor of the United States who executed the survey for patent on a mining claim was one of the two witnesses signing the affidavit required by statute and regulation for proof of posting on the claim of the plat and notice of intention to apply for patent, the patent application will be rejected, unless a supplemental affidavit by a proper witness is furnished, because regulatory provisions that the surveyor of a mining claim will not be allowed to prepare for the claimant papers in support of the application and that the surveyor must have absolutely nothing to do with the case except in his official capacity as surveyor disqualify the surveyor as a witness of posting for the patent applicant.

337

CONTESTS

Where mining claimants contest the issuance of oil and gas leases and the filing of applications therefor, alleging the existence of prior valid mining

MINING CLAIMS—Continued

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CONTESTS—Continued

claims, but it is impossible to identify the land covered by the mining claims from the land descriptions given in the notices to contest and in the location certificates of the claim and timely objection to the defective descriptions is made by the contestees, the contest proceedings can be dismissed for this reason alone.

103

Mining claimants who apply to contest oil and gas leases and applications for leases have the burden of showing the validity of their claims and must suffer the dismissal of their contests and the invalidation of their claims if they fail to sustain their burden.

103

Where contests by mining claimants have been dismissed by the Bureau of Land Management for failure to show a discovery, a rehearing will not be granted to permit the claimants to present evidence of discovery where such evidence was available at the time of the original hearing and the 38-year history of the claims shows laches on the part of the claimants in sustaining their claims.

103

Where the rules of practice of the Department provide that a hearing in a Government contest may be waived if all parties consent, and it appears in a contest brought against a mining claim that the disputed questions of fact can be satisfactorily resolved only by holding a hearing, the Department will not accede to a waiver of a hearing and a hearing will be ordered.

360

DETERMINATION OF VALIDITY

Where a deposit of sandstone is shown not to have a present or prospective market value,

MINING CLAIMS—Continued

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DETERMINATION OF VALIDITY—Continued

it is not a valuable deposit within the mining law and a claim based on such a deposit is properly declared null and void.

93

A mining claimant is not entitled to a hearing under the Administrative Procedure Act on the validity of the claim where it appears on the face of the record that the claim is invalid because the mining location was made at a time when the land included in the claim was embraced in an existing oil and gas lease issued under the terms of the Mineral Leasing Act, and the mining claimant had failed to comply with the provisions of the act of August 12, 1953. *United States v. Keith V. O'Leary et al.*, 63 I. D. 341 (1956), distinguished.

210

Insofar as a protest against an application for patent on a mineral entry asserts that a patent applicant has not complied with the law in any manner essential to a valid entry, the protest will be considered by the Department.

337

No hearing is necessary to declare mining claims void ab initio where the records of the Department show that at the time of location of the claims the land was not open to such location.

368

DISCOVERY

Where a deposit of sandstone is shown not to have a present or prospective market value, it is not a valuable deposit within the mining law and a claim based on such a deposit is properly declared null and void.

93

Recitals of discovery in notices of location are not evidence of discovery nor are

MINING CLAIMS—Continued	Page	MINING CLAIMS—Continued	Page
DISCOVERY—Continued		MILL SITES	
affidavits of annual assessment work or notices of intention to hold claims in years when assessment work is not required.....	103	Section 4 of the act of July 23, 1955 (69 Stat. 368; 30 U. S. C. sec. 612), is applicable to valid mill-site locations made after the act. The restrictions and limitations of section 4 are applicable to valid mill-site locations made prior to the act only if in accordance with section 6 thereof the owners waive and relinquish all rights in conflict with those restrictions and limitations. The owner of a valid mill-site location may cut and remove the timber on the claim for the purpose of constructing thereon a mill, reduction works, tramway, or other accessories required in the development of his mineral interests but he may not cut the timber for the purpose of selling it.....	301
LANDS SUBJECT TO		MINERAL SURVEYS	
Land which, in 1946, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, a mining claim located on such land is invalid.....	210	If a deputy mineral surveyor of the United States who executed the survey for patent on a mining claim was one of the two witnesses signing the affidavit required by statute and regulation for proof of posting on the claim of the plat and notice of intention to apply for patent, the patent application will be rejected, unless a supplemental affidavit by a proper witness is furnished, because regulatory provisions that the surveyor of a mining claim will not be allowed to prepare for the claimant papers in support of the application and that the surveyor must have absolutely nothing to do with the case except in his official capacity as surveyor disqualify the surveyor as a witness of posting for the patent applicant.....	337
Land included in oil and gas leases under the Mineral Leasing Act in 1952 was not then subject to mining location and, in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such land in that year are invalid..	368		
Land under lease or patent pursuant to the Small Tract Act is not open to location under the mining laws.....	368		
A locator of a mining claim does not acquire any property right by virtue of his location if the location is made on land not subject to appropriation..	368		
LOCATION			
The fact that a United States deputy mineral surveyor performed the work of locating a claim for a patent applicant does not, in the absence of evidence that at the time of location the surveyor had, or has since acquired, an interest in the land, make the location void by reason of section 452 of the Revised Statutes which prohibits the purchase or acquisition of interests in the purchase of public lands by officers, clerks, and employees of the General Land Office....	337		

MINING CLAIMS—Continued

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PATENT

Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered as an adverse claim unless filed within the required time.....

337

A suit pending in a State court based upon an asserted prior appropriation of a mining claim and amounting to an adverse claim against an application for mineral patent is not a judicial proceeding under section 2326 of the Revised Statutes which will stay action of the Department on the application for patent where the adverse claim was not filed in the land office within the time required by statute.....

337

POSSESSORY RIGHT

Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered as an adverse claim unless filed within the required time.....

337

SPECIAL ACTS

Land which, in 1946, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and in the absence of a showing of compliance with the provisions of

MINING CLAIMS—Continued

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SPECIAL ACTS—Continued

the act of August 12, 1953, a mining claim located on such land is invalid.....

210

Land included in oil and gas leases under the Mineral Leasing Act in 1952 was not then subject to mining location and, in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such land in that year are invalid....

368

TITLE

The general rule that a statute may not be retroactively construed so as to affect vested possessory rights or titles is not applicable to recording statutes provided a reasonable time is allowed for recording.....

393

NOTICE

In proceedings to probate the restricted estate of a deceased Indian of the Five Civilized Tribes in Oklahoma, substantial compliance must be had with the notice provisions of section 3 (b) of the act of August 4, 1947 (61 Stat. 731).....

17

OIL AND GAS LEASES**GENERALLY**

State community property laws should not be considered in determining the acreage chargeable to a holder of oil and gas leases because (1) they are governed exclusively by Federal law, (2) since their applicability has not been authorized by Congress their application would be contrary to the Constitution of the United States, and (3) the lessee's obligation is in the nature of a contractual obligation which can only be transferred with the approval of the Secretary of the Interior.....

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OIL AND GAS LEASES—Con.

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GENERALLY—Continued

The State laws applicable to Federal oil and gas leases are limited to those classes of laws authorized or recognized by section 32 of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*), as amended.....

44

Under the terms of an oil and gas lease issued pursuant to the provisions of the Mineral Leasing Act, as amended, and under the regulations of the Department which are a part of such a lease, there is a duty on the part of the lessee to market the gas from an oil well and this obligation is not discharged until the gas is in such a condition that it can enter the market for oil well gas in the field in which the oil well is located.....

76

ACREAGE LIMITATIONS

A husband and wife may each hold the maximum acreage permitted by section 27 of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*) as amended, to a single lessee. They may hold together, as an association, such maximum acreage. Where either holds the maximum acreage he (or she) may not hold additional acreage as trustee for minor children but where both hold the maximum acreage as an association either may hold in his (or her) own name or as trustee a total combined additional acreage equal to one-half the maximum.....

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APPLICATIONS

It is error to hold that land in an oil and gas lease became available for filing at the expiration of the primary term of the lease when in fact the lease was extended for another 5 years.....

9

OIL AND GAS LEASES—Con.

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APPLICATIONS—Continued

An application for an oil and gas lease filed after a relinquishment of an existing lease has been filed but before notation of the relinquishment is made in the tract book is prematurely filed and is properly rejected.....

9

Where an oil and gas lease is in its extended term, no application can be filed for the leased land regardless of whether the extension of the lease was valid or invalid.....

9

Where an oil and gas application was stamped as filed 2 minutes prior to the notation of cancellation of a prior lease covering the land and it is contended that the application was not prematurely filed because the stamping device was more than 2 minutes slower than the clock used in noting the cancellation, the official times noted on the application and in the tract book must be accepted as conclusive in the absence of positive evidence showing the times to be wrong.....

9

In the absence of anything to the contrary appearing in an offer for an oil and gas lease, it is proper to assume that an offer describing lands according to the official plat of survey is an offer to lease the described lands as shown by that plat....

81

An offer to lease lands for oil and gas purposes accompanied by insufficient rent to cover the lands described in the offer may not be rejected as to part of the lands described in the offer in order that the rental payment submitted with the offer will be sufficient to cover the remaining lands.....

81

Where an oil and gas lease offer is rejected because sufficient rent did not accompany the offer and the offeror appeals

OIL AND GAS LEASES—Con.

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APPLICATIONS—Continued

on the ground that the lands described in the offer are not the lands sought by the applicant, the appeal constitutes, in effect, an amendment of the offer-----

81

It is proper to reject an application for an oil and gas lease where the land sought is not described with sufficient clarity to identify it-----

81

Where an oil and gas lease application is filed jointly by two persons, one signing on his own behalf and as attorney-in-fact for the other, and the application is not, as to the asserted principal only, in compliance with the regulations and instructions in a matter that requires it to be rejected and returned without affording the applicants priority, it will not be considered as the sole application of the other applicant, but will be rejected in its entirety and will not earn any of the applicants any priority-----

230

An oil and gas lease offer under the act of February 25, 1920 (30 U. S. C. sec. 181), filed subsequent to the filing of a proper reservoir site application under the act of March 3, 1891 (43 U. S. C. sec. 946), or to the construction of a reservoir, must be rejected as to the land in the site and the lease when issued should exclude that land. The oil and gas in the area so excluded may be leased only under the act of May 21, 1930 (30 U. S. C. secs. 301-306), to the holder of the site-----

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A partnership as such cannot take and hold oil and gas leases under the mineral leasing laws of the United States. An application (offer) filed by a partnership should be considered and treated as an ap-

OIL AND GAS LEASES—Con.

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APPLICATIONS—Continued

plication (offer) by an association of citizens-----

351

"Associations of such persons" as used in section 1 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181), means a plurality of persons acting in association rather than associations as entities--

351

A minor may not take and hold a lease in his own right except through a guardian or trustee and this limitation of right applies equally whether the minor is a member of an association or is an individual applicant (offeror)-----

351

Where an oil and gas lease is automatically terminated because of the lessee's failure to pay the annual rental when due, the land in the lease is not available for the filing of offers to lease until the termination is noted on the tract book----

419

ASSIGNMENTS OR TRANSFERS

Title to or interest in an oil and gas lease may only be assigned or transferred subject to the approval of the Secretary of the Interior-----

44

The partial assignment of oil and gas leases during their extended 5-year terms under the act of July 29, 1954 (68 Stat. 585), amending section 30a of the Mineral Leasing Act of 1920, as amended (30 U. S. C. sec. 187a), has the effect of continuing in force all segregated leases of undeveloped lands for a period of 2 years from the effective date of the assignment and so long thereafter as oil or gas is produced in paying quantities, regardless of whether such segregated leases constitute the assigned or the retained portions of the original lease--

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OIL AND GAS LEASES—Con.	Page	OIL AND GAS LEASES—Con.	Page
ASSIGNMENTS OR TRANSFERS—Con.		DRILLING	
The approval of an assignment of a document filed by the parties which on its face is a valid assignment of record title will not later be vacated on the unilateral assertion of one party that the document was intended solely for collateral security purposes.....	413	Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, a competitive lease in its extended term by reason of production terminates by operation of law when production ceases unless diligent drilling operations are being conducted on the lease at that time, in the absence of an order under section 39 suspending operations and production on the lease.....	214
CANCELLATION		EXTENSIONS	
Where an oil and gas lease is prematurely issued before final action has been taken on a prior offer to lease the land, there must be a finding that the prior offeror is entitled to receive a lease on the land before the lease is canceled...	81	A 5-year extension of a noncompetitive oil and gas lease is not invalid where it was based upon an application for extension filed prior to 90 days before the expiration of the primary term of the lease...	9
If there is persuasive evidence to show that a prior oil and gas lease was canceled and the cancellation was noted in the official tract book by means of a line drawn through the serial number of the prior lease, the person first filing a qualified oil and gas lease offer after the notation was made is entitled to a lease of the land involved.....	353	Where Congress, over a long period of time, has consistently spelled out in detail the conditions under which it has granted the right to extensions of oil and gas leases or the limitations on that right are apparent, departure from that practice, which would result in an illogical and apparently unjustifiable grant, justifies an examination of available extraneous aids, including the legislative history of the law for the purpose of testing the language of the law against the intent of its enactment. If it is clear that the intent was different than the language implies, then such a construction will be given to it as appears justified as a result of such examination. So construed, paragraph (6) of the act of July 29, 1954, authorizes extensions for undeveloped portions of leases created by one or more partial assignments of a lease in its	
Where, on appeal to the Secretary, a question of fact is presented as to whether or not the cancellation of an oil and gas lease was noted in the official tract book by means of lines drawn through the serial number of the lease, the name of the lessee, and the description of the land in the lease prior to the filing of an oil and gas lease offer for the same land, and the evidence in the record is conflicting and inconclusive, the case will be remanded to the Bureau of Land Management to make a further investigation and to allow the parties an opportunity to submit additional evidence on the question of fact...	353		

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EXTENSIONS—Continued

extended term because of any other provision of the Mineral Leasing Act but does not authorize such extensions because of partial assignments of leases which are in their extended term pursuant to said paragraph (6)-----

127

Under the Mineral Leasing Act, as amended by the act of July 29, 1954, if production ceases on a competitive lease which is in an extended term by reason of production, the lease terminates by operation of law unless: (1) within 60 days after cessation of production, reworking or drilling operations are begun on the lease and thereafter conducted with reasonable diligence during the period of nonproduction; or (2) an order or consent of the Secretary suspending operations or production on the lease has been issued; or (3) the lease contains a well capable of producing oil or gas in paying quantities and the lessee places the well on a producing status within a reasonable time, not less than 60 days after notice to do so, and thereafter continues production unless and until the Secretary allows suspension-----

214

Where the holder of a lease which is in its extended term because of production performs some reworking operations following the cessation of production but fails to continue the operations, he is not entitled to an extension of his lease-----

215

Where production from a lease ceases because the well is no longer capable of production, the lessee is not entitled to the benefits of the provision in section 17 of the Mineral Leasing Act which provides

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EXTENSIONS—Continued

that no lease on which there is a well capable of production shall expire because the lessee fails to produce it unless the lessee is allowed not less than 60 days after notice to place the well on a producing status.

215

Where an oil and gas lease is extended pursuant to the last sentence in section 30a of the Mineral Leasing Act, as amended (68 Stat. 585; 30 U. S. C., 1952 ed., Supp. IV, sec. 187a), the extension runs from the next succeeding anniversary date of the lease for such part of 2 years as remain after deducting the period, if any, between the effective date of the (partial) assignment and such anniversary date and there is no change in the anniversary date-----

309

If the resulting extension is for less than a full year or if after it has run for a full year it is due to continue for less than another full year, the annual rental is to be prorated in the same proportion that the remaining fractional year of the extended term bears to a full year-----

309

The procedure with respect to the approval of assignments where the term of the assigned lease is extended by operation of law even after the lease term in which they were filed has expired is the same as it has always been. An assignment may be approved in such circumstances and the approval will relate back to the effective date of the assignment as fixed in section 30a of the [Mineral Leasing] act-----

309

Any lease issued under any provision of the Mineral Leasing Act which is in its extended term under any provision of that act is subject to partial

OIL AND GAS LEASES—Con.	Page	OIL AND GAS LEASES—Con.	Page
EXTENSIONS—Continued		EXTENSIONS—Continued	
assignment and the resulting lease or leases of any undeveloped land is entitled to the extension provided for in the law. The extension privilege does not apply to <i>renewals</i> of leases pursuant to section 17 of the act, as it read prior to its amendment August 21, 1935...	309	lease is committed to a unit plan is not entitled to a 5-year extension of his lease granted by section 17 of the Mineral Leasing Act where the lease is extended by the provisions of section 17 (b) of the act.....	405
The amendment to section 31 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181), by the act of July 29, 1954 (68 Stat. 585; 30 U. S. C., Supp. IV, sec. 188), providing for automatic termination of a lease, not containing a well capable of production, for non-payment of the annual rental, when considered in connection with the text of the act which it amends, and its purpose is not considered to apply to a failure timely to pay the second annual rental for the extended 5-year period where notice of the extension was not mailed to the lessee in time for him to receive it and return the rental so that it would be received not later than the seventh anniversary date of the lease...	333	An oil and gas lease which enters an extended term of 2 years for reasons other than production does not fall into the category of leases in their extended term because of production upon the obtaining of production during the 2-year extended term.....	413
The holder of a noncompetitive oil and gas lease is not given by his lease a contractual right to a 5-year extension which prevails over all other extension provisions of the Mineral Leasing Act as amended.....	405	FIRST QUALIFIED APPLICANT	
The owner of a noncompetitive oil and gas lease which is producing in paying quantities at the end of the primary term of the lease is not entitled to a 5-year extension as to such of the leased land as may not be situated within the known geologic structure of a producing oil or gas field at that time.....	405	The provision of section 17 of the Mineral Leasing Act, as amended, giving priority to the first qualified applicant coupled with the definition of simultaneous filings contained in the regulations and with the long-continued practice of the Department requires that an oil and gas lease offer received over the counter one second prior to a succeeding offer for the same land be recognized as prior to such succeeding offer, opportunity having been given both parties to file under a rule that would have made the filing of both offers simultaneous at least in the absence of any equitable reason for treating both as simultaneous.....	124
		LANDS SUBJECT TO	
		It is error to hold that land in an oil and gas lease became available for filing at the expiration of the primary term of the lease when in fact the lease was extended for another 5 years.....	9
		Where an oil and gas lease is in its extended term, no application can be filed for the leased land regardless of	

OIL AND GAS LEASES—Con.	Page	OIL AND GAS LEASES—Con.	Page
LANDS SUBJECT TO—Continued		RELINQUISHMENTS—Continued	
whether the extension of the lease was valid or invalid.....	9	the first instant of the day upon which it is filed, and is not effective merely from the time it is filed on that day.....	5
If there is persuasive evidence to show that a prior oil and gas lease was canceled and the cancellation was noted in the official tract book by means of a line drawn through the serial number of the prior lease, the person first filing a qualified oil and gas lease offer after the notation was made is entitled to a lease of the land involved.....	353	Where relinquishments of acquired lands oil and gas leases are filed on the first day of the fourth year of the lease, the relinquishments are effective to terminate the leases as of the first instant of the day upon which they are filed, although the time of filing was later in the day, and, therefore, rentals for the fourth lease year do not accrue.....	5
PRODUCTION		An application for an oil and gas lease filed after a relinquishment of an existing lease has been filed but before notation of the relinquishment is made in the tract book is prematurely filed and is properly rejected.....	9
Production from a lease may properly be regarded as having ceased on the final day of the last month during which any production from the lease was reported where the exact date of cessation of production within that month is not known....	214	RENTALS	
REINSTATEMENT		Where relinquishments of acquired lands oil and gas leases are filed on the first day of the fourth year of the lease, the relinquishments are effective to terminate the leases as of the first instant of the day upon which they are filed, although the time of filing was later in the day, and, therefore, rentals for the fourth lease year do not accrue.....	5
A request to vacate decisions approving partial assignments of noncompetitive oil and gas leases and returning the lands assigned to the base leases on the ground that parties did not intend the assignments to be made will be rejected where the parties did not appeal from the decisions approving the assignments within the time allowed; the assignments are regular on their face, and the parties, although informed of the filing of the assignments, made no protest against them.....	413	Neither the payment of advance rentals nor their receipt by departmental officials upon a lease which had terminated can continue or reinstate the lease.....	49
RELINQUISHMENTS		An offer to lease lands for oil and gas purposes accompanied by insufficient rent to cover the lands described in the offer may not be rejected as to part of the lands described in the offer in order that the rental	

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RENTALS—Continued

payment submitted with the offer will be sufficient to cover the remaining lands.....

81

Where an oil and gas lease is extended pursuant to the last sentence in section 30a of the Mineral Leasing Act, as amended (68 Stat. 585; 30 U. S. C., 1952 ed., Supp. IV, sec. 187a), the extension runs from the next succeeding anniversary date of the lease for such part of 2 years as remain after deducting the period, if any, between the effective date of the (partial) assignment and such anniversary date and there is no change in the anniversary date.....

309

If the resulting extension is for less than a full year or if after it has run for a full year it is due to continue for less than another full year, the annual rental is to be prorated in the same proportion that the remaining fractional year of the extended term bears to a full year.....

309

The procedure with respect to the approval of assignments where the term of the assigned lease is extended by operation of law even after the lease term in which they were filed has expired is the same as it has always been. An assignment may be approved in such circumstances and the approval will relate back to the effective date of the assignment as fixed in section 30a of the [Mineral Leasing] act.....

309

Any lease issued under any provision of the Mineral Leasing Act which is in its extended term under any provision of that act is subject to partial assignment and the resulting lease or leases of any undeveloped land is entitled to the extension provided for in the

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RENTALS—Continued

law. The extension privilege does not apply to *renewals* of leases pursuant to section 17 of the act, as it read prior to its amendment August 21, 1935..

309

ROYALTIES

In making settlement for the gas royalty due to the United States under an oil and gas lease, a lessee may not deduct from its royalty payment the cost incurred by the lessee in transporting oil well gas to the point of delivery specified in a contract for the sale of the gas when that point of delivery is in the field where the lessee's well is located nor may the lessee deduct the cost of compressing the gas so that it may enter the buyer's line at the working pressure specified under the contract of sale.....

76

The approval of a proposed unit agreement may properly be conditioned upon submission of a stipulation or other binding instrument to the effect that those Federal oil and gas leases committed to the agreement which provide for a 5 percent royalty rate shall, at the end of their respective 20-year terms or any extension thereof, become subject to the same royalty rate payable to the United States as would be applicable to renewals of such leases if the leases were not committed to the unit agreement.....

363

SUSPENSION OF OPERATIONS
AND PRODUCTION

Under an Indian tribal oil and gas lease which provided as a condition to its existence that oil and gas be produced in paying quantities, upon a cessation of production no authority is vested in the Secretary of the Interior to allow a

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SUSPENSION OF OPERATIONS AND PRODUCTION—Continued

suspension of operations and thereby continue the term of the lease-----

49

TERMINATION

Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, a competitive lease in its extended term by reason of production terminates by operation of law when production ceases unless diligent drilling operations are being conducted on the lease at that time, in the absence of an order under section 39 suspending operations and production on the lease-----

214

Where an oil and gas lease is automatically terminated because of the lessee's failure to pay the annual rental when due, the land in the lease is not available for the filing of offers to lease until the termination is noted on the tract book-----

419

TWENTY-YEAR LEASES

The approval of a proposed unit agreement may properly be conditioned upon submission of a stipulation or other binding instrument to the effect that those Federal oil and gas leases committed to the agreement which provide for a 5 percent royalty rate shall, at the end of their respective 20-year terms or any extension thereof, become subject to the same royalty rate payable to the United States as would be applicable to renewals of such leases if the leases were not committed to the unit agreement-----

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UNIT AND COOPERATIVE AGREEMENTS

The approval of a proposed unit agreement may properly be conditioned upon submis-

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UNIT AND COOPERATIVE AGREEMENTS—Continued

sion of a stipulation or other binding instrument to the effect that those Federal oil and gas leases committed to the agreement which provide for a 5 percent royalty rate shall, at the end of their respective 20-year terms or any extension thereof, become subject to the same royalty rate payable to the United States as would be applicable to renewals of such leases if the leases were not committed to the unit agreement-----

363

The owner of a noncompetitive oil and gas lease whose lease is committed to a unit plan is not entitled to a 5-year extension of his lease granted by section 17 of the Mineral Leasing Act where the lease is extended by the provisions of section 17 (b) of the act-----

405

PUBLIC LANDS**GENERALLY**

Lands which have been appropriated or reserved for a lawful purpose are not public, and are impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them-----

327

CLASSIFICATION

In exercising the discretionary authority vested in him by section 7 of the Taylor Grazing Act, as amended, the Secretary may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal, including the effect on the public interest-----

226

As a general rule, the first application filed for the classification of land under section 7 of the Taylor Grazing Act, as amended, is entitled to prior

PUBLIC LANDS—Continued**CLASSIFICATION—Continued**

consideration over subsequent applications for the same land.

226

The fact that land may be suitable for disposition under the first application filed therefor does not require the land to be classified for such disposition if the land is more suitable for other disposition.

226

State selections are to be preferred over conflicting private applications for the same land, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

226

Good administrative practice requires that when land is classified for disposal in a manner which precludes the allowance of applications for the land previously filed those applications be rejected immediately and sufficient time be permitted to elapse to allow the applicants to take appeals from the adverse classification before action is taken by the local office which will result in rights attaching to the classified land under later applications.

459

Although the Department has recently announced that State selections should generally, as a matter of principle, be honored over competing private applications for the same lands, a decision rejecting a prior State selection in favor of later small tract applications will be affirmed where it is shown that, when the land was classified, the prior State selection was considered along with the applications for small tracts and it was determined that the

PUBLIC LANDS—Continued

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CLASSIFICATION—Continued

land was more suitable for small tract disposition than for State selection, and where leases have already been issued on the land selected by the State.

459

DISPOSALS OF

Public land which has been withdrawn by Executive Order No. 6964 may not be disposed of until it has been classified, pursuant to section 7 of the Taylor Grazing Act, as amended, as suitable for such disposition.

225

PUBLIC RECORDS

The official grazing files are public records of which the Department takes notice in rendering decisions but the probative value of the files depends upon the contents of the files.

232

Invitations for bids, bids and contractual documents are public records to the extent that they do not involve "trade secret" and "know how" data. Public records are available for inspection in accordance with the procedure set forth in 43 CFR 2.1. Restrictions on the public's right to know how the Department's public business is conducted should be held to a minimum.

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REGULATIONS

(See also *Administrative Procedure Act*.)

GENERALLY

Where the regulations define "filed simultaneously" with respect to conflicting applications or offers as "filed at the same time," offers filed 1 or 10 seconds apart are not simultaneous filings, but the first offer received is filed prior to the next one.

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REGULATIONS—Continued**APPLICABILITY**

Where a lease provides that it is issued subject to regulations issued pursuant to a statute, in the absence of any other provision or indication to the contrary, the lease will be construed to incorporate only the regulations existing at the time when the lease was issued and not any future amendment of the regulations.....

Where a regulation governing renewal of small tract leases is amended after the issuance of a lease and is not specifically incorporated by reference in the lease, the regulation will be deemed applicable to the lease if it confers a benefit and not an added obligation on the lessee, does not affect the rights of others, and is not detrimental to the interests of the United States..

RIGHTS-OF-WAY

(See also *Indian Lands*.)

GENERALLY

The act of February 5, 1948 (62 Stat. 17; 25 U. S. C. sec. 323), providing for "rights-of-way for all purposes" over and across Indian lands applies to sites for all features and facilities, including dams, reservoirs, powerplants, and construction and operating camps, appropriate to water control projects undertaken by the United States.....

ACT OF MARCH 3, 1891

A reservoir site may be acquired under the act of 1891 either by construction of a reservoir on vacant surveyed or unsurveyed public land or by departmental approval of a map of the site if on surveyed land. A map of a site on unsurveyed land may be accepted for filing and information only..

Page RIGHTS-OF-WAY—Continued**Page****ACT OF MARCH 3, 1891—Continued**

A reservoir site acquired under the act of 1891 either by approval of a map or by construction of the reservoir is subject to any oil and gas lease offer filed prior to the site application or to such construction and a lease issued to the offeror will include the oil and gas deposits underlying the site.....

252

1 RULES OF PRACTICE**GENERALLY**

The Director of the Bureau of Land Management may, before an appeal is taken to the Secretary, reconsider a previous decision on his own motion and correct any errors that may have been made in the former decision.....

57

It is not a deprivation of "due process" for an officer other than the one who hears the evidence in a mining contest to decide the case.....

221

APPEALS**Generally**

Assuming that an objection to a hearing officer (that he was not appointed in accordance with the Administrative Procedure Act) would be timely if made for the first time on an appeal to the Director of the Bureau of Land Management, failure to raise the objection at that time will constitute a waiver of the objection.....

221

A motion to strike an answer filed by one who petitions to intervene on an appeal to the Secretary will be denied where the answer is a joint answer filed also by an adverse party who is entitled to answer the appeal.....

368

The failure to pay a \$5 filing fee for each of two leases in-

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RULES OF PRACTICE—Con.**APPEALS—Continued****Generally—Continued**

volved in an appeal to the Director from a manager's decision does not require that the appeal be dismissed where (1) the regulation, later amended, was not clear, (2) the manager's decision stated that an appeal involving the two leases must be accompanied by a filing fee of \$5, and (3) the manager accepted the \$5 fee as sufficient.....

Service on Adverse Party

An appeal to the Secretary will be dismissed where the appellant has failed to show that he served a copy of his appeal upon an adverse party within the time and in the manner required by the rules of practice, as revised effective May 1, 1956.....

Where a decision of the Director of the Bureau of Land Management indicates that there are adverse parties involved but fails to name them, an appellant from that decision is not required to serve such parties with copies of his notice of appeal.....

Statement of Grounds

Where on appeal to the Director, Bureau of Land Management, from a decision of a manager of a land office the appellant files a statement of the reasons for the appeal with the land office manager, within the 30-day period required for filing the statement but the statement is not received by the Director until the 30-day period has expired, the appeal is properly dismissed since the pertinent rules of practice provide that a statement of reasons, if not filed with the notice of appeal,

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RULES OF PRACTICE—Con.

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APPEALS—Continued**Statement of Grounds—Con.**

must be filed "in the office of the Director" within 30 days after the notice of appeal is filed.....

Timely Filing

Under a Government contract which provides for the taking of an appeal within 30 days, but does not specify with particularity either the event that starts or the event that stops the running of this period, the time for appeal begins to run when the contractor actually receives its copy of the decision of the contracting officer, and an appeal that is not mailed by the contractor until more than 30 days after the receipt of such copy is not timely and must be dismissed for lack of jurisdiction.....

Where under the Department's rules of practice a document is required to be filed in the office of the Director, Bureau of Land Management, the document is not considered filed until such time as it is actually received in the Director's office, and a document filed in a land office is not considered filed in the office of the Director.....

EVIDENCE

Where, on appeal to the Secretary, a question of fact is presented as to whether or not the cancellation of an oil and gas lease was noted in the official tract book by means of lines drawn through the serial number of the lease, the name of the lessee, and the description of the land in the lease prior to the filing of an oil and gas lease offer for the same land, and the evidence in the record is conflicting and inconclusive, the case will be remanded to the

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RULES OF PRACTICE—Con.	Page	RULES OF PRACTICE—Con.	Page
EVIDENCE—Continued		HEARINGS—Continued	
Bureau of Land Management to make a further investigation and to allow the parties an opportunity to submit additional evidence on the question of fact.....	353	able likelihood that a hearing would develop facts decisive of the issue and no showing is made by the applicant that he will be able to present evidence controverting the facts of record.....	9
When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.....	440	Where a contestee does not object to the fact that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act until the case is on appeal to the Secretary, the objection is not timely and does not require that the proceedings be set aside.....	221
GOVERNMENT CONTESTS		Where a timely objection was not raised by a contestee at a hearing that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act and there is no showing of actual prejudice to the contestee, there is no warrant for the Secretary to exercise his discretionary power to set aside the prior proceedings and to order a new hearing.....	221
Where the rules of practice of the Department provide that a hearing in a Government contest may be waived if all parties consent, and it appears in a contest brought against a mining claim that the disputed questions of fact can be satisfactorily resolved only by holding a hearing, the Department will not accede to a waiver of a hearing and a hearing will be ordered.....	360	Where the rules of practice of the Department provide that a hearing in a Government contest may be waived if all parties consent, and it appears in a contest brought against a mining claim that the disputed questions of fact can be satisfactorily resolved only by holding a hearing, the Department will not accede to a waiver of a hearing and a hearing will be ordered.....	360
HEARINGS		SUPERVISORY AUTHORITY OF SECRETARY	
Where the time stamp on an application shows that it was prematurely filed and the applicant contends that the stamp is erroneous and that the application was timely filed, a hearing will not be held on the issue where there is no reason-		Where a timely objection was not raised by a contestee at a hearing that the hearing officer was not appointed in accordance with the provisions of the Administrative Proce-	

RULES OF PRACTICE—Con.**SUPERVISORY AUTHORITY
OF SECRETARY—Continued**

dure Act and there is no showing of actual prejudice to the contestee, there is no warrant for the Secretary to exercise his discretionary power to set aside the prior proceedings and to order a new hearing-----

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SCHOOL LANDS**GRANTS OF LAND**

A grant to a State for school purposes attaches to no specific sections until the lands are surveyed, and prior to survey the United States may make other disposition of such sections which have been reserved for school use-----

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INDEMNITY SELECTIONS

The lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), does not authorize the selection of land known to be of mineral character. A reservation of a school section by the act of March 4, 1915, *supra*, bars mining locations on the section so long as the reservation is in effect. Such a reservation, short of an act of Congress, can be extinguished only by an approved selection in lieu of the land reserved-----

27

The act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), is not applicable to Alaska-----

27

SECRETARY OF THE INTERIOR

The Secretary of the Interior is not authorized by Federal reclamation law to agree to provisions in the proposed contract with the Kings River Conservation District whereby individual holders of excess lands will be permitted to pay the reimbursable costs allocable to their excess holdings and thereby be relieved from the

SECRETARY OF THE**INTERIOR—Continued**

Page

limitations on supplying water to excess lands and the consequences of the anti-speculation features of the recordable contracts required by law-----

273

The authority of the Commission to the Five Civilized Tribes and of the Secretary of the Interior to strike names from the rolls of the Five Civilized Tribes, after notice and an opportunity to be heard, continued to March 4, 1907, when the rolls were closed---

280

The fact that an heir who was enrolled with the Creek Tribe of the Five Civilized Tribes had received an allotment of land with another tribe of Indians justified action by the Commission to the Five Civilized Tribes and the Secretary of the Interior striking the heir's name from the Creek roll, which action was final after the passage of the act of April 26, 1906 (34 Stat. 137)---

280

Where a contract for the sale of Indian timber authorizes the Secretary to redetermine stumpage prices upon a finding of changed conditions, the Secretary has broad discretion to consider those factors and use those tests and methods of valuation which a capable and prudent businessman would use-----

305

SMALL TRACT ACT**GENERALLY**

Land under lease or patent pursuant to the Small Tract Act is not open to location under the mining laws-----

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APPLICATIONS

Where applicants to purchase land under a small tract lease deposited the application and purchase money in escrow with a bank and directed the

SMALL TRACT ACT—Continued	Page	SMALL TRACT ACT—Continued	Page
APPLICATIONS—Continued		RENEWAL OF LEASE—Continued	
bank to file the application within a certain time and the bank delayed the filing beyond the time specified, the applicants must suffer whatever consequences result from the action of their agent.....	116	showing is made that the lessee's failure to meet the requirements for sale of the tract is justified under the circumstances and that nonrenewal of the lease would work an extreme hardship on the lessee.....	52
RENEWAL OF LEASE		SALES	
Where under the Department's regulations in effect at the time a small tract lease is issued, the lessee is given a preferential right to renewal of his lease upon timely application therefor, if it is determined that a new lease should be issued, the preferential right must be recognized even though the Department's regulations are later amended prior to the expiration of the lease to impose additional conditions for renewal and to eliminate the preferential right to renewal.....	1	The departmental regulation governing applications to purchase under small tract leases carrying an option to purchase is not mandatory, but only directory, as to the time when an application to purchase is to be filed.....	116
A preferential right to renewal of a small tract lease if any new lease is issued granted under the terms of the lease is a contractual preference right which must be recognized if any new lease is issued after the expiration of the term of the existing lease.....	1	The departmental regulation governing applications to purchase under small tract leases where improvements are made does not apply to applications to purchase which are permitted by administrative action to be made without the construction of improvements.....	116
Where a regulation governing renewal of small tract leases is amended after the issuance of a lease and is not specifically incorporated by reference in the lease, the regulation will be deemed applicable to the lease if it confers a benefit and not an added obligation on the lessee, does not affect the rights of others, and is not detrimental to the interests of the United States.....	52	Where the holder of a small tract lease is given an option to purchase the land without making improvements and no time limit is expressed within which he must file his application, he may file his application within a reasonable time after the term of his lease has expired.....	116
An application for renewal of a small tract lease which has been classified for lease and sale may be approved where a		An application to purchase under a small tract lease, without making improvements, which is filed 25 days after the expiration of the lease term is not unreasonably late where no action has been taken to open the land to other filings and no intervening rights have attached to the land.....	116
		STATE LAWS	
		State community property laws should not be considered in determining the acreage chargeable to a holder of oil	

STATE LAWS—Continued

and gas leases because (1) they are governed exclusively by Federal law, (2) since their applicability has not been authorized by Congress their application would be contrary to the Constitution of the United States, and (3) the lessee's obligation is in the nature of a contractual obligation which can only be transferred with the approval of the Secretary of the Interior.....

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44

The State laws applicable to Federal oil and gas leases are limited to those classes of laws authorized or recognized by section 32 of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*), as amended.....

44

STATE SELECTIONS

(See also *School Lands*.)

State selections are to be preferred over conflicting private applications for the same land, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.....

226

Although the Department has recently announced that State selections should generally, as a matter of principle, be honored over competing private applications for the same lands, a decision rejecting a prior State selection in favor of later small tract applications will be affirmed where it is shown that, when the land was classified, the prior State selection was considered along with the applications for small tracts and it was determined that the land was more suitable for small tract disposition than for State selection, and where

STATE SELECTIONS—Continued Page

leases have already been issued on the land selected by the State.....

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STATUTORY CONSTRUCTION

GENERALLY

Where Congress, over a long period of time, has consistently spelled out in detail the conditions under which it has granted the right to extensions of oil and gas leases or the limitations on that right are apparent, departure from that practice, which would result in an illogical and apparently unjustifiable grant, justifies an examination of available extraneous aids, including the legislative history of the law for the purpose of testing the language of the law against the intent of its enactment. If it is clear that the intent was different than the language implies, then such a construction will be given to it as appears justified as a result of such examination. So construed, paragraph (6) of the act of July 29, 1954, authorizes extensions for undeveloped portions of leases created by one or more partial assignments of a lease in its extended term because of any other provision of the Mineral Leasing Act but does not authorize such extensions because of partial assignments of leases which are in their extended term pursuant to said paragraph (6).....

127

A clear expression of Congress is required to justify a construction of a statute which would reverse a general policy of the Government as declared in numerous statutes and where a system of related general provisions has been enacted with respect to a particular subject, new enactments of a fragmentary nature on the subject are to be taken as in-

STATUTORY CONSTRUCTION—Continued

GENERALLY—Continued

tended to fit into the existing system.....

127

Unrepealed provisions of earlier laws having specific application cannot be infused with new life for the purpose of implementing later law.....

273

The amendment to section 31 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181), by the act of July 29, 1954 (68 Stat. 585; 30 U. S. C., Supp. IV, sec. 188), providing for automatic termination of a lease, not containing a well capable of production, for non-payment of the annual rental, when considered in connection with the text of the act which it amends, and its purpose is not considered to apply to a failure timely to pay the second annual rental for the extended 5-year period where notice of the extension was not mailed to the lessee in time for him to receive it and return the rental so that it would be received not later than the seventh anniversary date of the lease.....

333

When the construction of a part of an act in accordance with the apparent meaning of its text considered alone would not only cause a departure from a long-continued procedure and a system established by a series of laws, but result in an inconsistency in the act itself, it is competent to examine matters *aliunde* the text including other contemporary legislation upon which the act is known to have been patterned to determine the true meaning of the text as well as the intent of the legislative assembly which enacted it. Thus, where it would require one agency to assume a part of

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STATUTORY CONSTRUCTION—Continued

GENERALLY—Continued

the cost of operations for which the law has appropriated funds to another agency but not other, related costs also covered by the same appropriation, resort will be had to appropriate extraneous aids to construction to ascertain the true intent of such provision.....

348-

The rule that where no penalty is provided in a statute, none can be assessed is not universal. It must be weighed in the light of the language of the statute granting a right or imposing an obligation. In particular, statutes dealing with the public lands place a responsibility upon the Secretary to see that they are enforced. Even though they have neglected to specifically fix that responsibility in him, it falls there naturally because of general statutes vesting authority in him over the public lands.....

393:

The general rule that a statute may not be retroactively construed so as to affect vested possessory rights or titles is not applicable to recording statutes provided a reasonable time is allowed for recording.....

393.

ADMINISTRATIVE CONSTRUCTION

Administrative rulings cannot thwart the plain purpose of a valid law nor can prior administrative practice remedy an absence of lawful authority.....

273.

Administrative rulings and practices cannot enlarge the application of the opinion of the Associate Solicitor dated October 22, 1947 (M-35004), which advised that full payment of the reimbursable costs by a district relieved the excess lands in that district from

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STATUTORY CONSTRUCTION—
Continued
ADMINISTRATIVE CONSTRUCTION—
Continued

the statutory restrictions on supplying water to such lands.

273

LEGISLATIVE HISTORY

Where Congress, over a long period of time, has consistently spelled out in detail the conditions under which it has granted the right to extensions of oil and gas leases or the limitations on that right are apparent, departure from that practice, which would result in an illogical and apparently unjustifiable grant, justifies an examination of available extraneous aids, including the legislative history of the law for the purpose of testing the language of the law against the intent of its enactment. If it is clear that the intent was different than the language implies, then such a construction will be given to it as appears justified as a result of such examination. So construed, paragraph (6) of the act of July 29, 1954, authorizes extensions for undeveloped portions of leases created by one or more partial assignments of a lease in its extended term because of any other provision of the Mineral Leasing Act but does not authorize such extensions because of partial assignments of leases which are in their extended term pursuant to said paragraph (6).

127

When the question arises whether a statute is mandatory or directory, it is necessary to determine the intent of Congress and when resort to the legislative history shows not only that the purpose to be served requires a construction that the statute is mandatory but evidence of a positive in-

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STATUTORY CONSTRUCTION—
Continued

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LEGISLATIVE HISTORY—Continued

tent to make it so, it must be treated as such.

393

TAYLOR GRAZING ACT
GENERALLY

The right to select unappropriated public land in lieu of land relinquished under the acts of July 1, 1898, and May 17, 1906, cannot be satisfied unless the land selected, if withdrawn, is determined, pursuant to the provisions of section 7 of the Taylor Grazing Act, as amended, to be proper for the satisfaction of the lieu right.

225

Section 1 of the Taylor Grazing Act, as amended, does not authorize the holder of a lieu selection right to select withdrawn land in satisfaction of his right.

226

CLASSIFICATION

In exercising the discretionary authority vested in him by section 7 of the Taylor Grazing Act, as amended, the Secretary may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal, including the effect on the public interest.

226

As a general rule, the first application filed for the classification of land under section 7 of the Taylor Grazing Act, as amended, is entitled to prior consideration over subsequent applications for the same land.

226

The fact that land may be suitable for disposition under the first application filed therefor does not require the land to be classified for such disposition if the land is more suitable for other disposition.

226

State selections are to be preferred over conflicting private applications for the same land,

TAYLOR GRAZING ACT—Con.

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CLASSIFICATION—Continued

even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.....

226

Although the Department has recently announced that State selections should generally, as a matter of principle, be honored over competing private applications for the same lands, a decision rejecting a prior State selection in favor of later small tract applications will be affirmed where it is shown that, when the land was classified, the prior State selection was considered along with the applications for small tracts and it was determined that the land was more suitable for small tract disposition than for State selection, and where leases have already been issued on the land selected by the State.....

459

Good administrative practice requires that when land is classified for disposal in a manner which precludes the allowance of applications for the land previously filed those applications be rejected immediately and sufficient time be permitted to elapse to allow the applicants to take appeals from the adverse classification before action is taken by the local office which will result in rights attaching to the classified land under later applications.....

459

TIMBER SALES AND DISPOSALS

Section 4 of the act of July 23, 1955 (69 Stat. 368; 30 U. S. C. sec. 612), is applicable to valid mill-site locations made after the act. The re-

TIMBER SALES AND DISPOSALS—Continued

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strictions and limitations of section 4 are applicable to valid mill-site locations made prior to the act only if in accordance with section 6 thereof the owners waive and relinquish all rights in conflict with those restrictions and limitations. The owner of a valid mill-site location may cut and remove the timber on the claim for the purpose of constructing thereon a mill, reduction works, tramway, or other accessories required in the development of his mineral interests but he may not cut the timber for the purpose of selling it.....

301

VIRGIN ISLANDS

LEGISLATURE

Members of the Legislature of the Virgin Islands who are entitled to per diem under section 6 (e) of the Revised Virgin Islands Organic Act may receive per diem only for such days as they are physically present in actual sessions of the Legislature.....

181

The Virgin Islands Legislature is in "actual session" when the roll is called and a quorum is present.....

182

WATERS AND WATER RIGHTS

STATE LAWS

Under California law an owner of private lands has a correlative and not an appropriative right to the use of percolating water underlying his land, and this right is analogous in many respects to the riparian right of the owner of land abutting on a watercourse.....

57

Under California law riparian rights do not attach to public land abutting on a watercourse until title to the land passes into private owner-

WATERS AND WATER RIGHTS—Continued

STATE LAWS—Continued

ship; until then the occupant of the public land has a right to appropriate water for use on the land.....

It is not settled under California law whether an occupant of public land has a correlative right to the use of percolating water underlying the land or only an appropriative right prior to passage of title to the land.....

WITHDRAWALS AND RESERVATIONS

GENERALLY

If a school section reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), is later withdrawn or reserved for governmental or other purposes, under the lieu selection provision of the act, the Territory may select land in lieu of that withdrawn or reserved, provided that the withdrawal or reservation was made under authority of the act of June 25, 1910 (36 Stat. 847), as amended (43 U. S. C. sec. 142), or other statutory authority. It is immaterial whether the withdrawal or reservation is permanent or temporary.....

WORDS AND PHRASES

Effective as of the date of its filing. The phrase "effective as of the date of its filing" in section 30 (b) of the Mineral

WORDS AND PHRASES—Con.

Leasing Act, providing that a relinquishment of an oil and gas lease "shall be effective as of the date of its filing," means that a relinquishment is effective to terminate the lease from the first instant of the day upon which it is filed, and is not effective merely from the time it is filed or that day..

Federal instrumentality. "Federal instrumentality" as used in the act of June 14, 1926, as amended (43 U. S. C. sec. 869), means only such a Federal instrumentality as is authorized by law to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States.....

Otherwise appropriated. "Otherwise appropriated" as used in the lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), includes governmental withdrawals or reservations.....

Rights-of-way for all purposes. The act of February 5, 1948 (62 Stat. 17; 25 U. S. C. sec. 323), providing for "rights-of-way for all purposes" over and across Indian lands applies to sites for all features and facilities, including dams, reservoirs, powerplants, and construction and operating camps, appropriate to water control projects undertaken by the United States.....

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